Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements.	)	

REPLY COMMENTS IN SUPPORT OF PETITION FOR FORBEARANCE

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INTRODUCTION AND SUMMARY

The case for granting this Petition was strong when it was filed and has grown undeniable since.

Even *before* BellSouth filed its Petition, this Commission had recognized that, "as the result of the development of intermodal competition among multiple platforms -- including DSL, cable modem service, satellite broadband service, and terrestrial and mobile wireless services" -- the "one-wire world" that existed at the time the Commission created and developed the *Computer Inquiry* requirements does not exist in today's broadband markets.[1] The existence of a vibrantly competitive intermodal market for broadband is crucial to the analysis here. That is so because the Commission has repeatedly concluded that competition, not regulation, is the best way to prevent unreasonable discrimination, protect consumers, and further the public interest,[2] which are the relevant criteria for forbearance.

Likewise, even *before* BellSouth filed this Petition, the Commission determined that it would be contrary to the public interest and to the congressional policy in favor of spurring broadband deployment – a policy codified by section 706 of the 1996 Act – to impose the same

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[1] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22747-48, ¶ 5 (2001).

[2] *See, e.g.*, Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*Directory Assistance Order*") ("[C]ompetition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory."); Report and Order and Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, 18 FCC Rcd 13620, 13638, ¶ 55 (2003) ("[T]he 1996 Act embodies a philosophy – new to telecommunications, but well-established in broadcasting – that competition is the most effective means of producing the marketplace results that best serve the public interest."), *aff'd in part, remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

Computer Inquiry rules at issue here on the market-leading cable providers.[3] The Commission further concluded that it would allow cable operators to continue to provide wholesale broadband transmission on a private carriage basis, and it tentatively held that it would forbear from applying all Title II common-carriage rules to them.[4] The Commission's decision as to the regulatory treatment of cable providers is obviously critical here as well. Simply put, if it is not in the public interest to impose *Computer Inquiry* and common-carriage requirements on the market leaders, it cannot be in the public interest to impose them on secondary wireline providers.

The Commission's decisions regarding cable are also a full and complete answer to the overheated claims of some commenters in this proceeding that BellSouth's Petition is somehow "unprecedented," "sweeping" or "extraordinarily broad."[5] BellSouth seeks only the *same* relief that the Commission has long found appropriate for the market-leading cable companies. There is nothing extraordinary about asking to be regulated in the same manner as one's larger competitors. Instead, that is a matter of simple fairness. Even more to the point, such a result is required both by principles of administrative rationality and by the Commission's pledge to adopt a "rational framework for the regulation of competing services that are provided via different technologies and network architectures."[6]

Events *after* BellSouth filed this Petition confirm the strength of these arguments and demonstrate the fundamental errors inherent in the primary claims advanced by commenters

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[3] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4826, ¶ 47 (2002) ("*Cable Modem Declaratory Ruling*"), *vacated in part*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir.), *cert. granted*, 125 S. Ct. 654, 655 (2004).

[4] *See id.* at 4830-31, 4847-48, ¶¶ 55, 95.

[5] AT&T at 2-3.

[6] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, ¶ 6.

opposing BellSouth's Petition. In late October 2004, this Commission issued its *Broadband Section 271 Forbearance Order*,[7] which granted a forbearance request that, like this one, involved wholesale access to wireline broadband facilities. In granting that request, the Commission *specifically rejected* the key assertions that opposing commenters make here. Among other things, the Commission rebuffed claims that: (1) insufficient competition exists in the "wholesale" broadband market to permit relief from network access requirements; (2) wireline providers had market power in providing broadband to business customers; and (3) deregulation would create a cable-wireline "duopoly" in broadband. The Commission's conclusions in that order undercut the key arguments made in the opposing comments here, which likely explains why opposing commenters have almost uniformly chosen to ignore those conclusions, even though the *Broadband Section 271 Forbearance Order* was released well before their comments were filed.

Additionally, in the short time since the Commission released its *Broadband Section 271 Forbearance Order*, the actions of participants in the marketplace have confirmed the correctness of the Commission's conclusion that intermodal *retail* competition will cause broadband competitors to make transmission available to unaffiliated providers. In particular, just this month, MCI trumpeted the fact that it will use the *cable* infrastructure of major companies such as Cox, Charter, and Time Warner to provide broadband services to business customers, and that, as a result of its access to cable, DSL, wireless, and satellite broadband platforms, it can now offer broadband to 90 percent of U.S. business locations.[8] In MCI's words,

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[7] Memorandum Opinion and Order, *Petitions for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, et al., FCC 04-254, 2004 FCC LEXIS 6098 (rel. Oct. 27, 2004) ("*Broadband Section 271 Forbearance Order*").

[8] *See* MCI Press Release, *MCI Adds Cable to Internet Broadband Mix* (Jan. 11, 2005) ("MCI Jan. 11 Press Release"), *at* http://global.mci.com/news/news2.xml?newsid=13211.

with its "expanded broadband portfolio, businesses can turn to MCI for nationwide uniform service across access options, without the complexity of managing multiple solutions from different providers."[9] Thus, in stark contrast to its claims here that "cable modem systems do not serve businesses" and that ILECs "remain the primary source for access to wholesale broadband transmission,"[10] MCI's actions in the real world demonstrate that retail broadband competition does in fact spur wholesale agreements by broadband providers even when, as in the cable context, those providers are under no legal obligation to enter into such deals.

Although BellSouth firmly believes that granting the relief requested herein will not affect the ability of any independent Internet service providers ("ISPs") to obtain broadband transmission, in order to eliminate any possible concern in this regard, BellSouth would not object to the Commission establishing a reasonable transition plan to ensure continuity of service as a condition of forbearance. As discussed further below, such a plan was previously proposed by the High Tech Broadband Coalition ("HTBC") and would require BellSouth to honor existing tariffs and agreements for an interim period of two years and to make available for that same period a basic broadband transport service to unaffiliated ISPs with the same functionality and at the same cost (volume, terms and conditions) that it provides to its affiliated ISP. This arrangement should put to rest claims that relief here will somehow doom the unaffiliated ISPs, which BellSouth in fact wants to continue to serve in order to maximize the utility of its network by carrying the greatest possible amount of traffic on that network.

In Part I of these Reply Comments, BellSouth will rebut opponents' substantive arguments, such as the supposed lack of sufficient broadband competition, and that BellSouth's requested relief is inconsistent with the requirements for forbearance. Part II responds to other

[9] *Id.*

[10] MCI at 6, 7.

miscellaneous claims regarding the relief that BellSouth has sought, such as the claim that the Commission should not grant this Petition because analogous issues are pending in other dockets. These miscellaneous claims provide no reason to deny the very relief that the Commission's prior precedents establish is in the public's best interest.

I. THE EXISTENCE OF SIGNIFICANT COMPETITION AS WELL AS THE COMMISSION'S DECISIONS REFUSING TO IMPOSE THESE SAME REGULATORY REQUIREMENTS ON CABLE PROVIDERS MANDATE FORBEARANCE HERE

BellSouth's Petition demonstrates that, as the Commission has previously explained, the *Computer Inquiry* rules are vestiges of a time when "very different legal, technological, and market circumstances presented themselves."[11] In today's broadband marketplace, there are an ever-increasing number of choices among intermodal alternatives. The existence of vigorous competition between these facilities-based alternatives greatly benefits consumers. As the Commission explained several months ago, "the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices."[12] As the Petition demonstrates,[13] in such a dynamic and competitive market – a market in which, the Commission recently reiterated, "the preconditions for monopoly are not present"[14] – neither Title II common-carrier regulation nor the radical surgery required by the *Computer Inquiry* rules is necessary to

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[11] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3037, ¶ 35 (2002) ("*Wireline Broadband NPRM*").

[12] Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, FCC 04-208, 2004 FCC LEXIS 5157, at *11 (rel. Sept. 9, 2004) ("*Fourth Advanced Services Report*").

[13] *See* Pet. at 16-33.

[14] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *26, ¶ 22.

(1) ensure reasonable, nondiscriminatory rates, (2) protect consumers, or (3) serve the public interest.

The conditions for forbearance under 47 U.S.C. § 160(a) are thus met. Simply put, market competition will ensure that consumers have a wide variety of choices at reasonable rates and that wireline providers will continue to enter into agreements with unaffiliated ISPs to keep as much traffic as possible on their networks. The Commission has repeatedly determined that carriers without market power need not provide service as a common carrier subject to Title II because they cannot discriminate unreasonably or charge unreasonable rates.[15] Moreover, granting forbearance will further the public interest and the interests of consumers because, as the Commission also has repeatedly emphasized, removing unnecessary regulatory burdens will allow companies to deploy next-generation broadband facilities more broadly and more efficiently.[16] As the Commission recently told the Supreme Court, establishing a "minimal regulatory environment for broadband services will most effectively further the statutorily grounded policy of encourag[ing] ubiquitous availability of broadband to all Americans."[17]

The Commission reiterated these same conclusions in its recent *Broadband Section 271 Forbearance Order*, in which it stated that "competition from multiple sources and technologies" will "pressure the BOCs to utilize wholesale customers to grow their share of the broadband

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[15] *See* Pet. at 29-30 (collecting authority).

[16] Because regulation is unnecessary *and* the interest in enhancing deployment of broadband counsels for forbearance, this case presents no need to "balance" competing interests. *Compare* AT&T at 10. Here, as in the *Broadband Section 271 Forbearance Order*, there is no "'trade-off' between short-term consumer harms and longer-term policy benefits." *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *36, ¶ 27 n.86.

[17] Brief for the Federal Petitioners, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, Nos. 04-277 & 04-281, at 29-30 (U.S. filed Jan. 19, 2005) ("FCC *Brand X* S. Ct. Br.") (internal quotation marks omitted; alteration in original).

markets."[18] For that reason, and because the "dynamic broadband market" provides "real competitive choice," regulation was not necessary either to prevent "unreasonable or discriminatory practices" or "for the protection of consumers."[19] Moreover, the Commission's analysis of the "public interest" led it to conclude that removing requirements to share wholesale transmission facilities would "encourage BOCs to further invest in, and deploy broadband technologies," thus advancing the congressional policy of enhancing broadband deployment reflected in section 706 of the 1996 Act.[20]

Equally strong support for BellSouth's position is provided by the Commission's determinations in the *Cable Modem Declaratory Ruling* that neither *Computer Inquiry* requirements nor common-carrier regulation should apply to the cable modem providers, which, according to this Commission's figures, serve a significant majority of broadband lines.[21] As BellSouth has emphasized throughout, it would be grossly unlawful and irrational for the Commission to conclude that *Computer Inquiry* and Title II regulations are contrary to the public interest (and section 706) as applied to the market leaders, but are nevertheless required for secondary wireline providers. If the public interest counsels for relying on the market and not regulation for the industry leaders, the public interest compels the same result for all players in that market.

Of course, opponents attempt to paint a very different picture. *First*, they claim that BellSouth's request for equal regulatory treatment is somehow extraordinary – something the

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[18] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *35, ¶ 26.

[19] *Id.* at *24-*25, *40, *41, ¶¶ 21, 29, 30.

[20] *Id.* at *44-*46, ¶¶ 33, 34.

[21] *See* Ind. Anal. & Tech. Div., WCB, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at Table 1 (Dec. 2004) ("*High-Speed Services Report*").

Commission allegedly has "*never* done . . . before"[22] – even though it is precisely the regime under which the Commission has decided cable providers should operate. Subsection A below addresses such arguments, as well as related claims that the Commission's treatment of cable modem service is somehow not relevant to the issue presented here.

Second, some commenters argue that, absent regulatory coercion, BellSouth will have the ability to discriminate against unaffiliated providers and harm the interests of consumers.[23] That claim is wrong because, as the Commission has long understood, when competition exists, the market, not regulation, is the best way to achieve just, reasonable and nondiscriminatory rates.[24] Indeed, by and large, commenters do not dispute that point. For instance, MCI concedes that "competition is the most effective means of ensuring that the charges and practices associated with telecommunications services are just, reasonable and nondiscriminatory."[25] Accordingly, the real dispute here – and the one to which opponents devote a large portion of their comments – is whether there is sufficient competition in the relevant market to warrant forbearance or whether BellSouth has analyzed the relevant market correctly.

Subsection B below addresses the various permutations of these claims, demonstrating that arguments about the supposedly separate "wholesale" market, the alleged differences between the residential and business broadband markets, and the purported dangers of creating a "duopoly" were rejected by this Commission in the recent *Broadband Section 271 Forbearance Order* and, moreover, are contrary to ample evidence. This Subsection also refutes the claims

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[22] EarthLink at 2.

[23] *See, e.g.*, CompTel/ASCENT at 9.

[24] *See, e.g.*, *Directory Assistance Order*, 14 FCC Rcd at 16270, ¶ 31 ("[C]ompetition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory.").

[25] MCI at 8.

that BellSouth has discriminated in the past, and establishes that, in any event, BellSouth would not object to a reasonable transition plan that removes any doubt that unaffiliated ISPs have continued access to broadband transmission.

Third, some commenters also take issue with BellSouth's showing that forbearance is in the interest of consumers and the public because it will avoid needless costs (as much as $3.50 per customer per month, as BellSouth has demonstrated) that inflate retail prices for broadband consumers and hinder BellSouth's ability to deploy new and advanced broadband facilities. As demonstrated in Subsection C below (and in the attached Fogle Reply Affidavit), these arguments are contrary to this Commission's prior findings and to significant evidence in the record.

Fourth, a few commenters take issue with BellSouth's request for relief from Part 64 accounting obligations. Subsection D demonstrates that these arguments lack merit.

A. The Commission Must Grant Secondary Wireline Broadband Providers the Same Relief That It Has Granted to Market-Leading Cable Providers

For opponents of BellSouth's requested relief, the Commission's treatment of cable broadband providers is an insurmountable problem. The Commission's decision to waive *Computer Inquiry* requirements for cable providers and to permit them to continue to act as private carriers unencumbered by sections 201, 202, or tariffing requirements cuts the legs out from under parties' claims that it would be somehow "unprecedented"[26] or do "violence to the Act"[27] to grant the same relief to ILECs. On the contrary, as the Petition demonstrates in detail,[28] what *would* be unlawful is for the Commission to fail to treat like services alike.[29] Any

[26] AT&T at 3.

[27] FDN/Pac-West at 3.

[28] *See* Pet. at 20-21.

such result would also be directly contrary to the Commission's commitment to create a regulatory regime that is "consistent . . . across multiple platforms" and avoids "embed[ding] particular technologies."[30]

Unable to distinguish the Commission's treatment of cable providers, some commenters resort to the claim that the Commission's *Cable Modem Declaratory Ruling* was wrong in these key points. EarthLink argues that the justifications given by the Commission in that decision were "both legally and factually inadequate."[31] But, just a few months ago, the Commission again specifically rejected EarthLink's core factual argument – that the broadband market is no longer new and evolving – when it specifically emphasized the "dynamic" and "developing" nature of that market.[32] And EarthLink's legal argument – based on the claim that the statute requires that cable companies be treated as common carriers to the extent they are offering telecommunications services[33] – disregards the Commission's conclusions that cable providers are *not* offering common carriage and additionally that, even if they are, the Commission would likely forbear from applying Title II to them.[34] The premise of EarthLink's argument is therefore

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[29] Nor is it the case, as AT&T contends (at 4), that Title II common-carrier requirements generally apply to all producers, regardless of market power. As the Petition demonstrates (at 29-30 & nn.104-110), the Commission has repeatedly determined that entities need not act as common carriers in instances in which they do not have market power.

[30] *Wireline Broadband NPRM*, 17 FCC Rcd at 3022, 3023, ¶¶ 4, 6. In this regard, there is also no basis for arguing, as some parties do, *see*, *e.g.*, Information Technology Ass'n of America ("ITAA") at 9-11, that the Commission lacks authority to forbear from applying the common-carrier requirements of Title II, including sections 201 through 203. Congress placed no such limit on the Commission's authority under section 160(a). On the contrary, that provision affirmatively mandates that the Commission forbear from "any regulation or *any* provision of this chapter." 47 U.S.C. § 160(a) (emphasis added).

[31] EarthLink at 27.

[32] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *40, ¶ 29.

[33] *See* EarthLink at 27-28.

[34] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4830-31, 4847-48, ¶¶ 55, 95.

invalid. Moreover, EarthLink concedes that the Ninth Circuit's decision in *Brand X* does not address forbearance,[35] so that it would not affect the issue here even if it were affirmed by the Supreme Court.

A few parties also make cursory arguments that there are differences between cable providers and wireline networks that justify differential treatment. These arguments can be dispatched quickly. For instance, the claim that cable networks, unlike wireline ones, are not readily capable of supporting the traffic of multiple ISPs is belied by market evidence.[36] As previously discussed, MCI recently announced a major expansion of its business broadband services by utilizing the cable networks of Charter, Cox, and Time Warner.[37] According to MCI, its agreements to use the broadband facilities of these major cable companies will allow it to offer "nationwide uniform service across access options, without the complexity of managing multiple solutions from different providers."[38] Similarly, EarthLink has made clear in SEC filings that it has an "agreement with Time Warner Cable and Bright House Networks, companies whose networks pass more than 22 million homes, to offer our broadband Internet services over their systems. . . . In the third quarter of 2001, we started providing services to subscribers via these networks, and as of June 30, 2002, our full package of high-speed Internet access, content, applications and functionality was available in all 39 markets served. As of December 31, 2003, more than 20% of our broadband subscribers were serviced via either the Time Warner Cable or Bright House Networks network."[39]

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[35] *See* EarthLink at 27 ("*Brand X* and forbearance are separate issues").

[36] *See, e.g.*, ALTS at 5-6; AT&T at 32-33; CompTel/ASCENT at 10-11.

[37] *See* MCI Jan. 11 Press Release.

[38] *Id.*

[39] EarthLink, Inc., Form 10-K, at 17 (SEC filed Mar. 5, 2004) ("EarthLink 2004 10-K").

Nor is there merit to claims that "historical differences" between the deployment of cable and wireline networks justify a different regulatory treatment.[40] In fact, just like cable companies, BellSouth and other ILECs have invested billions of dollars in broadband facilities without any assurance of a return. Indeed, BellSouth made substantial investments in DSL technology in the late 1990s, *after* the end of rate base, rate-of-return regulation, *after* the local market was opened to competition, and, thus, *after* any regulator (at the state or federal level) was able to guarantee BellSouth any opportunity to earn any return on such investment.

Before offering its broadband services, BellSouth had no DSL-related equipment deployed nor had BellSouth invested any substantial amounts of time or dollars in DSL operations. As a result, when BellSouth began investing the resources necessary to support its DSL product offerings, BellSouth was in precisely the same position as every other DSL provider seeking to enter the broadband marketplace. BellSouth has since analyzed carefully the marketplace and made considerable investments, which have resulted in more than 76 percent of households in BellSouth's nine-state region being capable of receiving DSL service. BellSouth saw a business opportunity and then capitalized on this opportunity by making wise, prudent capital investments to offer DSL service as a competitive alternative in the broadband market. Any other communications company could have made similar investments had they been so inclined.

To date, BellSouth has invested over $1.5 billion to support its DSL offerings in a highly competitive market occupied by no less than 480 broadband providers nationwide.[41] This investment includes the cost of upgrading BellSouth's backhaul network and deploying DSL

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[40] ALTS at 5.

[41] *See High-Speed Services Report*, Table 6.

capability in more than 1,200 BellSouth central offices and 12,000 BellSouth remote terminals. Every dollar of this investment is at risk, and BellSouth has no guarantee from anyone, especially any state or federal regulator, that it will have an opportunity to recover its investment, let alone earn a reasonable return.

B. The Competitive and Dynamic Nature of the Broadband Market Is Sufficient To Grant Forbearance Relief

Opponents of BellSouth's Petition also claim that the actions of cable providers are not relevant here because they allegedly do not compete in the markets on which the Commission should focus its inquiry (for instance, the "wholesale" broadband market). Once the markets are properly defined, these parties claim, it is clear that ILECs retain market power and thus the ability to discriminate against unaffiliated ISPs. These arguments are uniformly incorrect, and indeed have all been rejected by the Commission in the *Broadband Section 271 Forbearance Order*. In any event, to avoid any conceivable concerns about discrimination, BellSouth would not object to the Commission adopting a reasonable transition plan that ensures unaffiliated ISPs have continued access to wireline broadband transmission, as described more fully below.

1. Vigorous Retail Competition Is Directly Relevant to the Analysis Here

Commenters generally acknowledge that residential consumers have the benefit of significant broadband competition; they claim, however, that the story is very different for unaffiliated carriers and ISPs seeking access to wholesale broadband transmission. MCI thus asserts that, although "*end users* have a competitive alternative for Internet access service," "[t]he appropriate focus should be on the wholesale market for BellSouth's underlying transmission facilities."[42] AT&T similarly acknowledges, with enormous understatement, that there is "nascent competition in a limited number of *retail* broadband services markets," but

[42] MCI at 6 (emphasis added).

argues that this fact does not justify deregulation of the ILECs' "*wholesale* last-mile facilities."[43] Many other commenters make similar claims.[44] This argument is directly contrary to precedent, established economic principles, and abundant evidence that retail competition does in fact lead broadband providers to strike wholesale deals.

First and foremost, the Commission rejected this *exact same argument* about the alleged effects of forbearance on a purportedly separate wholesale broadband market just a few months ago. In the *Broadband Section 271 Forbearance Order*, the Commission squarely decided that it was unnecessary to impose wholesale access obligations in the broadband context because *retail* competition ensured that BOCs would have significant incentives to strike wholesale deals rather than lose customers to intermodal competition. As the Commission explained, "competition from multiple sources and technologies in the *retail* broadband market, most notably from cable modem providers, *will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business.*"[45] The Commission thus concluded that, "because the BOCs face intense intermodal competition, . . . they will need to find ways to keep traffic 'on-net,' which we conclude would likely include the provision of wholesale offerings."[46] In short, the Commission "*reject[ed] the arguments . . . that a fully competitive wholesale market is a mandatory precursor to a finding*" that regulation is unnecessary to ensure reasonable and nondiscriminatory rates "regardless of the state of intermodal retail competition in the retail

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[43] AT&T at 2.

[44] *See*, *e.g.*, CompTel/ASCENT at 13; EarthLink at 14-15.

[45] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *34-*35, ¶ 26 (emphases added).

[46] *Id.*

market."[47] Indeed, the Commission noted, if the analysis of these commenters were correct, "no amount of intermodal competition or investment disincentives could ever warrant forbearance if there was not also a fully competitive wholesale market," a proposition that was unreasonable on its face and contrary to the D.C. Circuit's conclusion in an analogous context that the Commission "'cannot ignore intermodal alternatives.'"[48]

The Commission's analysis on this point is precisely correct.[49] BellSouth currently provides service to hundreds of independent ISPs, and it has no incentive to cast aside the revenues it receives from keeping them "on-net." Indeed, EarthLink itself has recently attested to the effectiveness of retail competition in ensuring reasonable wholesale rates. In stark contrast to its position here, EarthLink explained in a recent SEC filing that "*[t]he intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance.*"[50] Moreover, EarthLink has recently announced that it is entering into a joint venture with South Korea's largest wireless carrier to offer wireless data services in the United States, demonstrating yet again that there are multiple platforms capable of supporting broadband access for unaffiliated ISPs.[51]

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[47] *Id.* at *38, ¶ 28 (emphasis added).

[48] *Id.* at *38-*39, ¶ 28 (quoting *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 572-73 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313 (2004)).

[49] FDN and Pac-West are wrong in arguing that this recent decision is distinguishable on the basis that competitive local exchange carriers ("CLECs") are more likely than ISPs to deploy their own facilities. *See* FDN/Pac-West at 29. Given the existence of a competitive broadband market, CLECs, just like ILECs, will enter into arrangements to offer wholesale transmission to ISPs.

[50] EarthLink 2004 10-K, at 10 (emphasis added).

[51] *Earthlink, SK Telecom Form Joint Venture,* Associated Press (Jan. 26, 2005).

Indeed, because of its desire to keep wholesale customers on its network, BellSouth has recently made many enhancements to its wholesale transmission product that were in no way mandated by law but were intended to better serve independent ISPs (particularly, small ISPs). In particular, in 2004, BellSouth offered two new products and three price promotions. One new product offered economical savings to smaller ISPs by providing a shared ATM connection to the broadband gateway ("BBG") that allows multiple architectures on the same connection. Another product allowed a DS1 connection to the BBG, providing a lower-cost startup product aimed at smaller ISPs that do not need a DS3 connection. In addition, BellSouth offered three different pricing promotions in 2004 that allowed great savings for ISPs using the BellSouth broadband network.[52] The details of these promotions are as follows:

- DS3 promotion: allows a 75 percent discount on the DS3 BBG connection and DS3 Lightgate transport (when purchased together) and allows a network service provider ("NSP") to connect to BellSouth on the BBG technology at near DS1 rates during the promotional period, this promotion was offered until the DS1 connection product could be launched to help lessen the start-up cost especially for the smaller NSPs. Nine ISPs signed up for this promotion.

- 256K promotion: offered from September 1, 2004 until January 31, 2005, this promotion provides two months of credit for each new 256K DSL order completed.

- NRC promotion: launched March 3, 2004 until December 31, 2004, this promotion provides NRC credit for all new Virtual Circuits, the amount of which is determined on a sliding basis and is dependent on how many subs are ordered each month. This promotion was capped at 100 orders (gearing towards the smaller NSPs).

BellSouth does not need (and does not use) the DS3 or NRC promotions for its retail broadband Internet access product. Nevertheless, because it operates in a competitive market,

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[52] Fogle Reply Aff. ¶ 15.

BellSouth's business interests led it to make these enhancements and incentives available to independent ISPs.[53]

Cable providers, which as a result of this Commission's decisions have no obligation to offer wholesale broadband transmission, are likewise responding to retail competition by entering into agreements to provide wholesale transmission. This is demonstrated by the recent deal, discussed above, that MCI reached to use cable facilities to serve business customers. It is further demonstrated by EarthLink's statements that it has an "agreement with Time Warner Cable and Bright House Networks, companies whose networks pass more than 22 million homes, to offer [EarthLink] broadband Internet services over their systems," and that, as a result of this agreement, "more than 20% of our broadband subscribers were serviced via either the Time Warner Cable or Bright House Networks network."[54]

Moreover, BellSouth has already been moving toward market-based arrangements with unaffiliated ISPs. For that reason, today, only 55 percent of the independent ISP end users that use BellSouth broadband transmission rely upon BellSouth's tariffed service. The remaining 45 percent are served over enhanced broadband transmission services that BellSouth has negotiated through private commercial agreements. When all broadband subscribers within BellSouth's region are taken into account, the percentage of end users actually receiving service over the tariffed basic transmission that BellSouth must offer pursuant to the *Computer Inquiry* regime is ***less than two percent***.[55] Nevertheless, BellSouth continues to incur tens of millions of dollars of

[53] *Id.*

[54] EarthLink 2004 10-K, at 17.

[55] Fogle Reply Aff. ¶ 9.

yearly expense to comply with the *Computer Inquiry* mandates, the vast majority of which does not vary by the number of customers actually using the basic transmission.[56]

The fact that market pressures have led retail broadband players to enter into wholesale contracts should not be surprising. It is wholly consistent with the established economic understanding that vertically integrated self-suppliers (such as cable providers in this context) are part of the relevant market because, in response to competitive pressures, they too can sell at wholesale.[57] For instance, the *Horizontal Merger Guidelines* issued jointly by the U.S. Department of Justice and the Federal Trade Commission require that each agency's identification of firms that participate in the relevant market begin with *all* firms that currently produce or sell in the relevant market, including "vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market."[58] "In addition, the Agency will identify other firms not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses."[59] These so-called "uncommitted supply responses" are included in the relevant market whether they come about "by the switching or extension of existing assets to production or sale in the relevant market; or by the construction or acquisition of assets that enable production or sale in the relevant market."[60]

Professor Areeda's antitrust treatise likewise emphasizes that self-suppliers that can easily switch production to provide service at wholesale must be considered part of the relevant

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56 *Id.*

57 *See* FDN/Pac-West at 20.

58 United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.31 (Apr. 8, 1997).

59 *Id.* § 1.32.

60 *Id.*

market.[61] This is because, as a matter of economics, "*a defendant dominating industry output – or hoping to do so – cannot raise prices to monopoly levels by reducing output when its rivals have a large volume of efficient excess capacity that can quickly generate additional and readily saleable output.*"[62] Professor Areeda stressed that, if an alleged monopolist attempted to raise its prices to monopoly levels, "[t]he higher . . . price may induce an integrated firm to expand its . . . production – to supply others in direct competition with the alleged monopolist."[63] "Hence, captive output constrains the provider whether or not the integrated firms sell" to other retail providers the inputs that the vertically integrated firm uses for its own retail offerings.[64] Thus, "the integrated firm's . . . output belongs in the market."[65]

Similarly, in the seminal *Alcoa* case, Judge Learned Hand applied these principles to hold that Alcoa's *entire* aluminum ingot production should be included in the relevant market, regardless of whether that production was sold to independent companies that used the ingot as an input in fabricating other products, or whether Alcoa used the production to fabricate such products itself.[66] As Judge Hand explained, even though "[t]hat part of its production which 'Alcoa' itself fabricates, does not of course ever reach the market as ingot . . . , the ingot fabricated by 'Alcoa' necessarily had a direct effect upon the ingot market," because "[a]ll ingot – with trifling exceptions – is used to fabricate intermediate, or end, products; and therefore all intermediate, or end, products which 'Alcoa' fabricates and sells, pro tanto reduce the demand

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[61] *See, e.g.*, 2A Phillip E. Areeda, *et al.*, *Antitrust Law* ¶ 423, at 81-82 (2d ed. 2002).

[62] *Id.* ¶ 535c, at 221 (emphasis added).

[63] *Id.* ¶ 535e, at 226.

[64] *Id.*

[65] *Id.*

[66] *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-25 (2d Cir. 1945) ("*Alcoa*").

for ingot itself."[67] In the half-century since the *Alcoa* decision, other courts consistently have applied the same principles in similar circumstances.[68]

Moreover, on numerous prior occasions the Commission has been asked to define artificially separate markets for wholesale services in order to attribute providers of those services with market power that they do not possess. In each of these prior instances, the Commission has rejected such claims, adhering instead to the same principles that the federal antitrust agencies and the courts have consistently applied. For example, in its *Fourth CMRS Order*,[69] the Commission rejected requests by wireless resellers to place switches between the

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[67] *Id.* at 424.

[68] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) (faulting the Commission for failing to consider carriers that self-provide facilities in evaluating competitive alternatives); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) ("[T]he capability of other production facilities to be converted to produce a substitutable product is referred to as the cross-elasticity of supply. The higher [this] cross-elasticit[y], the more likely it is that similar products . . . are to be counted in the relevant market."); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 691 (9th Cir. 1976) (production cross-elasticity must be considered when defining product market); *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) ("Where there is cross-elasticity of supply, a would-be monopolist's attempt to charge supracompetitive prices will be thwarted by the existence of firms willing to shift resources to producing the product, thereby increasing supply and driving prices back to competitive levels."); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) ("[D]efining a market on the basis of demand considerations alone is erroneous . . . . A reasonable market definition must also be based on 'supply elasticity.'"); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1367-68 (5th Cir. 1976) (ability of growers to switch to produce different types of flowers precludes a chrysanthemum-only market); *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 47 (D.D.C.) (ease with which suppliers could shift production among types of glass bottles undercut limitation of market to certain end users), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988); *In re ITT*, 104 F.T.C. 280, 411 (1984) (captive bakers included in market with wholesale bakers because captives could readily divert production to other retail groceries in response to an increase in wholesale baker prices); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (finding that market for nonresidential solid waste was not limited to Dallas but also included firms from nearby Fort Worth, that could easily supply Dallas market if such service became profitable); *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1493-94 (D.C. Cir. 1995).

[69] Fourth Report and Order, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd 13523 (2000) ("*Fourth CMRS Order*").

switches operated by facilities-based wireless providers and the switches of wireline local exchange carriers. The Commission reasoned that there was no need to impose such an obligation – which, in effect, would have required facilities-based wireless providers to piece-out and begin offering on a wholesale basis portions of their network – given the extensive competition among integrated facilities-based providers of wireless services.[70] The Commission explained that, "to the extent that resale switch interconnection is an economically attractive way of providing CMRS service, we anticipate that the increasing degree of CMRS competition should provide incentives for facilities-based CMRS providers to agree to switch interconnection to increase their revenues."[71]

The Commission also has applied these same principles in its analysis of the long-distance market. In approving the AT&T/McCaw merger, for example, the Commission rejected arguments that there was a separate market comprised of long-distance carriers that served wireless customers. The Commission instead found that the relevant market included *all* long-distance carriers, including those providing only wireline long-distance service, since these carriers could easily serve wireless customers as well, even if they were not currently doing so.[72] The D.C. Circuit upheld the Commission's ruling, holding that "[i]t is of little consequence that consumers have no good substitutes if *producers* can immediately respond to a firm's price increase by switching production to that firm's products," and that "whatever market definition is employed, relative ease of entry by other firms should always be taken into account. The one

[70] *See id.* at 13531-32, ¶ 20; *id.* at 13532, ¶ 22 (explaining that the resellers' request would "inevitably lead to unbundling of the facilities-based provider's network").

[71] *Id.* at 13531-32, ¶ 20.

[72] *See* Memorandum Opinion and Order, *Applications of Craig O. McCaw and AT&T Co. for Consent To Transfer Control*, 9 FCC Rcd 5836, 5846-47, ¶¶ 13-14 (1994).

course that would be clearly wrong would be to define the market as A alone while ignoring the ease of entry from B producers."[73]

Applied here, these precedents mean that cable modem providers are part of the "wholesale" broadband market. Like the defendant in *Alcoa*, cable modem operators are the dominant providers of broadband services, but operate primarily on a vertically integrated basis. And, as demonstrated by the recent MCI transaction, these cable operators nonetheless have the ability to use their capacity to provide services at wholesale, and, therefore, constrain the behavior of competing DSL providers that do provide wholesale service. Thus, the fact that the cable operators use part or all of their transmission facilities for their own broadband services, and that such facilities do not "ever reach the market," is irrelevant; such facilities still have a "direct effect" on the "wholesale" broadband market.[74]

For all these reasons, the Commission's recent decision rejecting arguments that it must restrict its analysis to a supposedly separate wholesale market accords with established precedent.

2. Both the Residential and Business Broadband Markets Are Competitive

Commenters also contend that BellSouth has failed to distinguish between the residential broadband and the business broadband markets. This supposed error is significant, AT&T contends, because BellSouth allegedly faces significantly less competition in the business broadband market in that "traditional cable modem service is not a viable alternative for the

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[73] *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1493 (D.C. Cir. 1995) (internal quotation marks omitted).

[74] *Alcoa*, 148 F.2d at 424-25.

majority of broadband needs of most business customers."[75] Other commenters make similar claims.[76]

These arguments are again contrary to the Commission's express determinations. In the *Broadband Section 271 Forbearance Order*, the Commission "reject[ed] AT&T's argument" that "forbearance should not be granted because cable providers tend not to serve business customers."[77] The Commission reasoned that, "[b]ecause competitive LECs can still obtain access to network elements under section 251 to serve business customers, and because of actual and potential intermodal competition from other services" "forbearance . . . is warranted" as to business customers.[78]

Such arguments also are contrary to the facts. As noted above, MCI announced just this month that it has expanded its "Internet Broadband portfolio to include high-speed cable access," and that, as a result of this expansion, it can now reach "90 percent of all U.S. business locations."[79] MCI explained that this new relationship would permit it to offer cable broadband service that would be "cost-effective," "reliable," and uniform across multiple business locations.[80]

Even before MCI's recent announcement, vigorous and growing competition from cable was prevalent for business broadband customers. Five of the six largest cable system operators (which, collectively, represent approximately 90 percent of consumer cable modem subscribers)

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[75] AT&T at 32.

[76] *See*, *e.g.*, FDN/Pac-West at 15; ITAA at 6; National Ass'n of Telecomms. Officers and Advisors at 9; MCI at 7.

[77] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *29, ¶ 22 n.68.

[78] *Id.*

[79] MCI Jan. 11 Press Release.

[80] *Id.*

already offer broadband services specifically tailored to small businesses.[81] Cable operators have acknowledged that they can readily serve most small-business customers with their existing infrastructure, and that it makes sense to do so.[82] Indeed, these cable operators already have been very successful in attracting small-business subscribers.[83] For example, Time Warner Cable's senior vice president of Commercial Services recently stated that "[w]e're continuing to drive this business. . . . It's been a huge driver from the revenue standpoint."[84]

Moreover, by their own account, cable operators are now aggressively extending their fiber to the premises of large office buildings.[85] Cox Business Services has thus announced a

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[81] *See* Jea-Hun Shim & Richard R. Read, Credit Lyonnais Securities, *The U.S. Cable Industry – Act I* at 196-202 (Nov. 20, 2002); Time Warner, *Road Runner - Business Class*, http://www.rrbiz.com/RoadRunner/index.asp?sid=1.

[82] *See, e.g.*, Duffy Hayes, CED, *Pickers' Dilemma*, http://www.cedmagazine.com/ced/2002/0902/09a.htm (Cox Business reaches "more than 90 percent of Cox's overall footprint nationally, marketing basic data and video services aggressively to small- and medium-sized businesses the company can easily serve with current network connections."); Andrea Figler, *Turning Businesses into Customers*, Cable World (Dec. 9, 2002) (Ken Fitzpatrick, Senior Vice President, Commercial Services, Time Warner Cable: "We've got an infrastructure there that is just ripe for commercial services. . . . We pass 1.2 million businesses.").

[83] *See, e.g.*, Jessica Reif-Cohen, *et al.*, Merrill Lynch, *Cox Communications: Chasing Profits and the 4 Million Non-Video Homes*, at 6 (July 30, 2004) (Cox Business Services has "over 100,000 customers in over 18 markets" and "could continue to scale in 2004 as it expands its network to reach more than 25% of businesses within its franchise."); Jim Barthold, *Small Business, Big Money, No Guarantees*, TelephonyOnline (Aug. 12, 2002) (Kevin Curran, senior vice president of marketing and sales for Cablevision Lightpath: Cablevision "can't keep up with demand" for Cablevision's Business Class Optimum Online service for small businesses).

[84] Alan Breznick, *Cable Operators Show They Really Mean Business*, Cable Datacom News (Sept. 2004) ("Time Warner officials say they enjoyed a $60 million gain in business sector revenue last year, boosting their overall commercial take by 70%. The MSO now boasts more than 140,000 commercial accounts for its Road Runner Business Class line of services.").

[85] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17009-10, ¶ 40 (2003) ("*Triennial Review Order*"), *aff'd in part, rev'd in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert denied*, 125 S. Ct. 313 (2004); *see also* Derek Chang, Executive Vice President, Finance & Strategy, Charter Communications,

major plan to "expand [the] capabilities of the HFC infrastructure,"[86] and Time Warner has explained that "we do have an opportunity to go more aggressively after the enterprise business."[87] Comcast states that it "has been delivering service to commercial organizations since 1995 and has thousands of customers leveraging the Comcast network for critical business applications."[88]

Further, opponents' claims that cable's near-ubiquitous HFC network is technologically incapable of meeting the demands of business customers are proven wrong by market realities. Cable companies are routinely offering asymmetrical business class high-speed service over their widely available HFC facilities with upstream speeds at or above 1.544 Mbps. For instance, Time Warner Cable's Road Runner Business Class services utilize its "robust hybrid fiber-coaxial network to deliver high speed Internet access to your small or medium-sized business."[89] Time Warner Cable offers no less than seven different service speeds over its HFC facilities, including a symmetrical 1.5 Mbps service, as well as an asymmetrical 4 Mbps Downstream/2 Mbps Upstream service level, all of which Time Warner Cable is offering in direct competition to wireline broadband services.[90] Similarly, Cox Communications offers its Cox Business Internet service over its "widely available hybrid fiber coax (HFC) infrastructure" with

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presentation before the JP Morgan High Yield Conference, at 23 (Feb. 2, 2004) (Charter is moving "'up-market' to compete in Enterprise RFP environment").

86 Jimmy Hayes & Bill Stemper, Cox Communications, Cox Business Services, *Seizing Market Opportunities*, presentation before the UBS Warburg Media Week Conference, at 23 (Dec. 2003).

87 Thomson StreetEvents, *TWX – Q2 2004 Time Warner Inc. Earnings Conference Call Final Transcript*, at 8 (July 28, 2004) (quoting Don Logan, Chairman of Media, Communications Group, Time Warner).

88 Comcast Commercial, *Services*, *at* http://www.comcastcommercial.com/index.php?option=content&task=view&id=6&Itemid=27.

89 Time Warner Cable, *at* http://www.twcs.net.

90 Time Warner Cable, *at* http://www.twcs.net/products/access.php.

downstream bandwidth up to 3 Mbps providing "equivalent data transfer speed of more expensive T-1 connections."[91]

Moreover, as the *Broadband Section 271 Forbearance Order* makes clear, "the availability of intermodal competition from cable operators is only part of [the] analysis."[92] Separate and apart from the evidence of cable competition, the fact remains that ILECs are secondary players in the business market, and that other wireline carriers, chiefly AT&T, MCI, and Sprint, are the leaders in providing data services to businesses. In the words of a January 2005 report, AT&T and MCI "retain the bulk of enterprise market share" and provide data services to 85 percent of surveyed businesses, with Sprint "account[ing] for the rest."[93] AT&T, MCI, and Sprint also control approximately three quarters of the market for packet-switched data services such as ATM and Frame Relay,[94] which is now the biggest single telecom expenditure

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[91] Cox Business Services, *at* http://www.coxbusinessmga.com/cbi.html.

[92] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *29, ¶ 22 n.68.

[93] Jeffrey Halpern, Bernstein Research, *U.S. Telecom: Superior Growth Prospects Make Enterprise Market a Key Battleground for U.S. Service Providers*, at 7 (Jan. 6, 2005) ("Halpern, *Superior Growth*").

[94] A report by Schwab Soundview Capital Markets finds that, as of January 2004, AT&T, MCI, and Sprint together controlled 79 percent of the frame relay market and 60 percent of the ATM market. And because the frame relay market is much larger than the ATM market, these companies' share of the combined market for broadband services provided to large businesses is approximately 75 percent. *See* Michael Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.*, at 3 (Jan. 21, 2004). In 2003, IDC estimated that total frame relay revenues were $7.44 billion while total ATM revenues were $1.98 billion. *See* Ron Kaplan, IDC, *U.S. Frame Relay Services Forecast, 2002-2007*, at Table 2 (Mar. 2003); Ron Kaplan, IDC, *U.S. ATM Services Forecast, 2002-2007*, at Table 2 (Mar. 2003); Jim Duffy & Michael Martin, *Who Says the Bells Aren't Spending?*, Network World (Mar. 10, 2003) ("[A] key motivation for RBOCs to offer long-distance is the requirement that Hogue described: the need for frame relay service nationwide. Currently, interexchange carriers AT&T, Sprint and WorldCom dominate that multibillion-dollar market. '[The RBOCs have] really been shut out of the most lucrative part of the frame relay business, and that's the long-haul portion,' says Curtis Price, an analyst at Stratecast Partners."); David Dorman, Chairman and CEO, AT&T, presentation before the Credit Suisse First Boston Media and Telecom Week, at 5 (Dec. 11, 2003) (AT&T is the nation's "largest private line/frame relay/ATM provider.").

by large enterprise customers.[95] The big three are also the major providers of other specialized high-speed data services provided to business customers, such as IP VPN.[96] Thus, although the RBOCs have tried "to push their way into the enterprise market for long-distance voice and data services," they "have achieved only limited penetration into this market," with "AT&T, MCI, and, to a lesser extent, Sprint controlling the high ground."[97]

Given this evidence, there is simply no basis to conclude that ILECs do not face significant competition in the market for broadband access for business customers. Rather, as in the residential market, they are secondary players competing against companies that are not subject to the same regulatory obligations. Thus, just as in the *Broadband Section 271 Forbearance Order*, the Commission should reject arguments that forbearance relief should be limited to the residential market.

3. Because Broadband Competition Is Ubiquitous, Relief Should Be Granted on a National Basis

Commenters also claim that BellSouth has not adequately distinguished between local geographic areas in defining the relevant market. That fact is significant, these parties contend,

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[95] *See* Michael Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.*, at 2 (Jan. 21, 2004) ("ATM and frame relay services constitute the majority of telecom spending by businesses."); Ron Kaplan, IDC, *U.S. Packet/Cell-Based Services Market Forecast and Analysis, 2000-2005*, at 1 (Mar. 2001) (ATM and Frame Relay accounted for over 96 percent of revenues in the packet/cell-based services market in 2000).

[96] *See, e.g.*, Henry Goldberg, In-Stat/MDR, *VPNs Take a New Look: Trends in the US IP VPN Services Market* at Table 5 (Jan. 2004); Forrester Research, *VPN Sales are Strong, With AT&T in the Lead*, *at* http://www.forrester.com/Research/Document/Excerpt/0,7211,34903,00.html (excerpt of report by Maribel D. Lopez, *et al.* published Sept. 20, 2004) ("Almost 90% of the 116 large enterprises that Forrester interviewed are using VPNs today. Similar to last year, AT&T ranked as the top provider for VPN sales, with almost double the percentage of its nearest competitor."); *see also* Lynda B. Starr, Probe Group LLC, *The Enterprise Market*, at 9, Chart 2 (Dec. 2003) (Probe Research estimates that this market opportunity represented more than $2.7 billion in revenues in 2003, growing to nearly $7 billion by 2008.).

[97] Halpern, *Superior Growth*, at 8.

because "the existence of competitive alternatives in one locality has no bearing on the analysis regarding presence or absence of competitive alternatives in another."[98]

This argument also is contrary to Commission precedent. Because there are *ubiquitous* alternatives to wireline broadband services, this Commission has consistently granted deregulatory relief on a national, not local, basis. First, in the *Cable Modem Declaratory Ruling*, the Commission exempted market-leading cable providers from *Computer Inquiry* and common-carriage requirements on a nationwide basis. Then, in the *Triennial Review Order*, the Commission similarly declined to require section 251unbundling of broadband facilities on a nationwide basis because broadband facilities were already "provided in a competitive environment."[99] In so doing, the Commission relied on evidence that, nationally, "more consumers continue to obtain their high-speed Internet access by cable modem service than by xDSL, and the rate of growth for cable modem subscribership continues to outpace the rate of growth for xDSL subscribership."[100] The Commission's reliance on this evidence of intermodal competition was specifically endorsed by the D.C. Circuit in its decision affirming this aspect of the *Triennial Review Order*.[101]

Finally, in the *Broadband Section 271 Forbearance Order*, the Commission granted *nationwide* forbearance relief based largely on the existence of broad-based and ever-increasing

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[98] *E.g.*, EarthLink at 16.

[99] *Triennial Review Order*, 18 FCC Rcd at 17151-52, ¶ 292.

[100] *Id.*

[101] *See USTA II*, 359 F.3d at 582 ("[R]obust intermodal competition from cable providers – the existence of which is supported by very strong record evidence, including cable's maintenance of a broadband market share on the order of 60% – means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs.") (internal citation omitted).

intermodal competition in the "dynamic" broadband market.[102] The Commission relied on the existence of "competition from multiple sources and technologies in the retail broadband market, most notably cable modem broadband providers," without making any geographic distinctions.

The Commission's decision to proceed on a nationwide basis in all these proceedings is firmly grounded in marketplace reality. As Commissioner Martin recently noted,[103] analysts concluded in 2002 that no more than five percent of U.S. households would be able to receive DSL but not cable modem by the end of 2003.[104] And even that small number is likely significantly overstated, because it was based on the assumption that cable modem service would be available to only 76 percent of all U.S. households as of year-end 2003, whereas the actual total today is approximately 95 percent.[105]

Moreover, cable modem is not the only alternative to wireline broadband. Other broadband technologies (including wireless and satellite) are not only growing, but also focusing on the few, more rural areas that cable modem may not serve. As Chairman Powell explained last year, "We're already beginning to see it . . . the explosive growth all over the country –

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[102] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *40, ¶ 29.

[103] *See* Commissioner Kevin J. Martin, *Presentation to the 22d Annual Institute on Telecommunications Policy and Regulation* (Dec. 3, 2004).

[104] *See* Jason B. Bazinet, *et al.*, JP Morgan, *Broadband 2003: Deflation Looms and Market Shares Will Shift*, at 12, Figure 9 (Dec. 5, 2002).

[105] *See id.*; NCTA, Statistics & Resources (last visited Jan. 25, 2005), *at* http://www.ncta.com/Docs/PageContent.cfm?pageID=86; Craig Moffett et al., Bernstein Research, *Cable and Telecom: VoIP Deployment and Share Gains Accelerating; Will Re-Shape Competitive Landscape in 2005*, at Exh. 1 (Dec. 7, 2004); *see also* Craig Moffett *et al.*, Bernstein Research, *Broadband Update: Dial-Up Conversion Still Accelerating, with No End in Sight*, at 9-10 (Dec. 2, 2004) (As of the third quarter of 2004, cable modem service was available to 95.1 percent of cable homes passed.).

everything from Wi-Fi technologies to wireless ISPs that are popping up, particularly in rural America."[106]

4. The Dynamic Broadband Market Undermines Any Concerns About Duopoly

Commenters such as ALTS claim that granting relief here would "create a virtual duopoly for residential broadband services," a result that allegedly "would not be in the public interest."[107]

Again, however, the Commission has rejected this mode of analysis, which looks only at current market shares and ignores the evolving, dynamic nature of broadband and the rapid growth of additional broadband platforms. The Commission explained just a few months ago in the *Broadband Section 271 Forbearance Order* that it "specifically reject[s] the assertions of competitive carriers that forbearance should be denied because the BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators."[108] Such arguments, the Commission emphasized, take an incorrect "static view . . . of th[e] dynamic broadband market."[109] The Commission emphasized that "broadband technologies are developing" and that it "expect[s] intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines,

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[106] Michael Powell, Chairman, FCC, remarks before the FCC Wireless Broadband Forum, Washington, D.C. (May 19, 2004); *see also Fixed Wireless as Residential Access Sees Renewed Life*, Electronic News (Nov. 19, 2003) ("'Reduced equipment costs, improved performance, and an aggressive set of vendors and wireless ISPs are making fixed wireless a serious broadband contender in rural towns and urban fringes.'") (quoting Tom Elliott, Vice President, Strategy Analytics); David Reeder, Vice President, Sales, Airspan Networks, remarks before the FCC Wireless Broadband Forum, Washington, D.C., Transcript at 48 (May 19, 2004) ("[R]ural markets are Airspan's focus for the U.S. . . . [T]he demand in those areas is very high.").

[107] ALTS at 9.

[108] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *40, ¶ 29.

[109] *Id.*

and fixed and mobile wireless in addition to the cable providers and BOCs."[110] The Commission explained that, far from creating the anticompetitive results that commenters fear, granting forbearance in this increasingly competitive environment will "substantially *enhance* the competitive forces that . . . prevent the BOCs from engaging in unjust or unreasonable practices at any level of the broadband market."[111]

That conclusion is strongly supported not only by the evidence collected in BellSouth's Petition,[112] but also by additional information that has become available in the past few months. For instance, as to Broadband over Power Lines, recent data show that "[a]t least four U.S. power companies are offering commercial-level BPL service to customers, and others are offering BPL on a test basis"[113] and that fully "one-third of electric utility companies are considering or already using BPL."[114] Indeed, as Commissioner Martin demonstrated in his recent presentation, BPL is in the process of being deployed by many utilities in a large number of major cities.[115] The Power Line Communications Association thus estimated that by the end of last year "broadband over power line w[ould] reach between 750,000 and 1 million customers."[116] And, when BPL was rolled out in Cincinnati by Cinergy Electric "40% [of BPL

[110] *Id.*

[111] *Id.* at *40-*41 (emphasis added).

[112] *See* Pet. at 10-13.

[113] Grant Gross, *FCC Action Charges Up Broadband over Power Lines*, Network World (Oct. 18, 2004).

[114] James D. Breen, *et al.*, Thomas Weisel Partners, *Broadband over Power Lines: Finally . . . After All Those Years*, at 2 (May 3, 2004).

[115] *See* Commissioner Kevin J. Martin, *Presentation to the 22d Annual Institute on Telecommunications Policy and Regulation* (Dec. 3, 2004).

[116] Will Rodgers, *Power To Interfere?*, Tampa Trib., MoneySense, Jan. 5, 2004, at 10. In February 2004, EarthLink invested $500,000 in BPL provider Ambient; EarthLink had teamed with Ambient in its BPL pilot with Con Edison. *See* Comm. Daily (Feb. 23, 2004).

customers] abandoned Time Warner Cable, 40% abandoned telco DSL, and 20% are new to broadband."[117] In sum, as one industry analyst recently stated, the evidence shows that "broadband over power lines (BPL) is now a technologically and economically viable third pipe into American homes to provide broadband and VoIP services in the years ahead."[118]

Similarly, recent actions by AT&T demonstrate the enormous potential of fixed wireless to provide broadband. In November 2004 AT&T stated that over the next year to year and a half it will run two trials of WiMax wireless broadband, which AT&T claims "will be a way to connect to . . . 100,000" buildings housing business customers (out of what AT&T estimated were 245,000 such buildings nationwide).[119]

Spurred by this Commission's recent deregulatory actions, alternative wireline providers are also bringing alternative broadband functionalities to consumers. For instance, Covad recently launched a new system that uses UNE loops and its own network to create a "line-powered system" that can "be used for high-speed Internet access over greater distances than traditional digital subscriber line service from the Bells."[120] Covad plans to offer wholesale access to this system "in the second half of this year."[121]

Finally, Hughes Network Systems, Inc. the world's leading provider of satellite broadband solutions, recently announced that it "achieved record growth in its consumer and

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[117] Tom Wolzien *et al.*, Bernstein Research, *Weekend Media Blast #32: Fiber Comes to River Road*, at 1 (Aug. 6, 2004).

[118] Scott Cleland, Precursor, *Bell Fiber Deployment Plans Get Messier* (Nov. 18, 2004).

[119] Ephraim Schwartz, *Reality Check: The World According to AT&T*, InfoWorld (Nov. 19, 2004). (quoting Hossein Eslambolchi, CTO, CIO and President of AT&T Global Networking).

[120] Reuters, *Covad To Offer Competitor for Bells' Phone Network* (Jan. 12, 2005).

[121] *Id.*

small business segment" in 2004, which reinforces the conclusion that satellite broadband too is a growing intermodal competitor.[122]

Nor is there any reason to believe that consumers are unwilling to switch between broadband providers. On the contrary, churn rates for DSL-based broadband services exceed three percent *per month*, and rates for cable broadband are only slightly lower.[123]

All this evidence confirms that, as this Commission has stressed, broadband continues to be a dynamic and evolving market in which regulation will only harm consumers by slowing development and artificially handicapping some classes of providers.

5. Because BellSouth Lacks Market Power, Other Claims That It Has Discriminated Are Both Wrong and Irrelevant

As discussed above, BellSouth does not have market power in broadband transmission and thus cannot discriminate unreasonably in the provision of those services to unaffiliated carriers. Moreover, and in any event, commenters' claims that BellSouth has discriminated in the past as to other services are misguided.

In particular, a number of parties claim that BellSouth has discriminated by choosing to provide its retail broadband Internet access product as an add-on to local voice service and, accordingly, not providing that service to consumers that receive voice service on UNE lines leased by CLECs.[124] These parties, however, disregard the Commission's repeated and explicit

[122] *Hughes Network Systems Reinforces Industry Leadership with Record Growth in Consumer and Small Business Broadband Market*, Business Wire (Jan. 7, 2005).

[123] *See, e.g.*, R. Bilotti, *et al.*, Morgan Stanley, *Cable/Satellite: 2005 Broadband Outlook* (Jan. 14, 2005) ("[W]e estimate that DSL churn is still above 3%. This compares to an average of 2.5-3.0% for cable operators.").

[124] *See, e.g.*, FDN/Pac-West at 38-41; CompTel/ASCENT at 8-9.

rejection of identical claims and its findings that this policy is neither discriminatory nor contrary to the public interest.[125]

Similarly, there is no basis to the vague claims that BellSouth is somehow seeking to inhibit VoIP through regulatory forbearance.[126] The plain fact is that VoIP providers such as Vonage do not need to receive wholesale broadband transmission from BellSouth, but rather can provide their service over any retail broadband connection, including cable (as Vonage itself notes[127]). The relief that BellSouth is seeking here would thus have no effect on them. In all events, contrary to claims that BellSouth might block transmissions from unaffiliated ISPs, BellSouth has pledged to adhere to the High-Tech Broadband Coalition's ("HTBC") principles of consumer connectivity, which bar any such action (as well as other actions that would be contrary to consumer interests).

6. BellSouth Would Not Object to a Reasonable Transition Plan That Ensures Unaffiliated Providers Would Have Continued Access to Broadband Transmission

Although there is no valid basis to believe that BellSouth could engage in unreasonable discrimination in the absence of regulatory obligations, BellSouth would not object to the Commission requiring, as a condition for forbearance, a two-year transition plan that ensured unaffiliated ISPs access to broadband transmission. Such a plan would be based on the

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[125] *See* Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9100-01, ¶ 157 & n.562 (2002) (rebuffing claim that BellSouth's policy was "discriminatory"); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595, 17683, ¶ 164 (2002) (same); Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828, 25922, ¶ 178 (2002) (rejecting assertion that BellSouth's policy constituted anticompetitive tying and thus was not in the public interest).

[126] *See* FDN/Pac-West at 7-9.

[127] *See* Vonage at i.

principles previously set forth by the HTBC,[128] which outlined a two-year transition plan away from the *Computer Inquiry* regime, replacing one-size-fits-all tariffed offerings with individually tailored commercial agreements.

In accord with the HBTC proposal, BellSouth would not object to a requirement that, as a condition of forbearance, BellSouth must for a period of two years:

(1) honor existing transport agreements (whether tariffed or contracted) with unaffiliated ISPs. Where ISPs have purchased transport services under tariffs, BellSouth will remain obligated to maintain those services under the same terms and conditions as specified in the tariff, but provided for under a new contractual agreement.

(2) make available a basic transport service to unaffiliated ISPs with the same basic functionality and at the same cost (volume, terms and conditions) that it provides to its affiliated ISPs. This service shall cover the basic broadband transport functionalities between qualified end user locations and the wireline broadband provider's designated interconnection point.

(3) post a basic broadband transport agreement on its website. During this transition, unaffiliated ISPs may agree to the terms specified in the posted agreement or may negotiate other commercial arrangements beyond the basic service terms of the posted agreement.

[128] Ex Parte Letter from Robert Holleyman, *et al.* to Michael K. Powell, Chairman, FCC, CC Docket Nos. 02-33, *et al.* (Sept. 25, 2003); Ex Parte Letter from Robert T. Blau, Vice President-Executive and Federal Regulatory Affairs, BellSouth, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 02-33, *et al.* (Sept. 29, 2003).

C. Current Regulatory Requirements Harm Consumers and the Public by Increasing Costs and Hampering Deployment of Next-Generation Broadband

The Commission's recent Supreme Court brief in *Brand X* soundly refutes the notion that the imposition of *Computer Inquiry* and common-carrier obligations does not impose costs or hinder broadband deployment. As the Commission told the Supreme Court, the imposition of such obligations on cable providers would "dramatically alter" the regulatory environment in which they operate.[129] Cable broadband providers would have new "financial obligations," and "could also be obligated to engineer and operate their cable systems to . . . provide 'open' access to cable facilities."[130] Such regulatory burdens would likely raise costs to consumers and create a predictable drag on investment: "Those heightened regulatory obligations could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas."[131]

That analysis accords with the Commission's finding in both the *Triennial Review Order* and the *Broadband Section 271 Forbearance Order*, in which the Commission similarly concluded that regulatory sharing requirements impede wireline broadband development.[132] Indeed, in the recent *Broadband Section 271 Forbearance Order*, the Commission specifically stressed the "costly requirement of designing the broadband network to create access points for the various components," in determining that forbearance was in the public interest.[133] As Eric Fogle explained in his affidavit attached to BellSouth's Petition, similar requirements to engineer

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[129] FCC *Brand X* S. Ct. Br. 30.

[130] *Id.* at 30-31.

[131] *Id.* at 31.

[132] *See Triennial Review Order*, 18 FCC Rcd at 17145, ¶ 278; *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *42-*43, *45-*46, ¶¶ 31, 34.

[133] *Id.* at *45-*46, ¶ 34.

BellSouth's network to allow access to a pure transmission service have in fact created significant costs for BellSouth and delayed deployment of new and efficient broadband technologies, to the detriment of consumers and the public interest.

Despite the fact that Mr. Fogle's analysis accords with the Commission's own repeated conclusions, some parties take issue with it. Their arguments do not withstand scrutiny. First, as Mr. Fogle explains in his reply affidavit, far from overstating the costs associated with current regulatory requirements, BellSouth's calculations are extremely conservative. "[T]he only costs that have been included [by BellSouth] are those costs that are *directly* associated with the added work functions of groups that are necessary to comply with the outdated CI regime."[134] Thus, BellSouth did not include many very real costs associated indirectly with compliance with that regime. Moreover, although some parties note that the *Computer Inquiry* rules do not mandate a separate affiliate,[135] as Mr. Fogle explains in detail in his reply affidavit, in a number of instances, the only practicable way of ensuring compliance with those rules is functionally separate (and thus redundant) staffing.[136]

While AT&T correctly notes that current packet technologies allow for the intermingling of enhanced and basic functionalities on the same facilities,[137] that fact supports BellSouth's argument. As a result of the *Computer Inquiry* rules, BellSouth is uniquely unable to take advantage of the full functionalities and efficiencies of this equipment, because it must ensure that the underlying transport be designed in a way that allows it to be made available to independent ISPs on a nondiscriminatory basis, whether or not there is a market for that

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[134] Fogle Reply Aff. ¶ 10.

[135] *See, e.g.*, AT&T at 44.

[136] *See* Fogle Reply Aff. ¶ 4.

[137] *See* AT&T at 44-45.

transmission.[138] That requirement imposes significant cost and delay in development, which substantially harms consumers and the public interest.[139]

Moreover, contrary to AT&T's claim,[140] compliance with that regime hamstrings BellSouth's attempts to compete with other broadband providers and thus harms consumers. First, although AT&T claims that BellSouth can suffer no harm if the product at issue is a wholesale one, as demonstrated above, BellSouth faces vigorous wholesale competition from cable companies, IXCs (especially in the business market), and others.[141] Moreover, BellSouth's *retail* broadband services cannot take advantage of any new functionality until the transport is made available to independent ISPs.[142] BellSouth is thus impeded from competing for both wholesale and retail customers by these requirements.

In sum, as discussed in more detail in Mr. Fogle's Reply Affidavit, opposing commenters do nothing to undermine the obvious point that compliance with unnecessary and burdensome regulations raises costs and causes delay, which ultimately harms consumers and the public interest by impeding broadband deployment. That result, moreover, is directly contrary to the congressional judgment reflected in section 706, which this Commission recently (and properly) reiterated "directs [it] to use, among other authority, [its] forbearance authority under section 10(a) to encourage the deployment of advanced services."[143]

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[138] *See* Fogle Reply Aff. ¶ 5.

[139] *See id.*

[140] *See* AT&T at 45.

[141] *See* Fogle Reply Aff. ¶ 7.

[142] *See id.*

[143] *Broadband Section 271 Forbearance Order*, 2004 FCC LEXIS 6098, at *23, ¶ 20 (internal quotation marks omitted).

Finally, AT&T's contention that Title II tariffing requirements cause no competitive harm when applied to parties without market power is directly contrary to Commission precedent. As the Commission has explained, imposing tariffing requirements on nondominant providers hurts consumers and the public interest by: "(1) removing incentives for competitive price discounting; (2) reducing or taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs."[144] AT&T's arguments ignore these Commission findings.

D. The Commission Should Forbear From Applying the Part 64 Accounting Rules

No commenter seriously contests the elimination of Part 64 accounting rules. The obvious reason is that these rules have long outlived their usefulness, and there exists no serious justification for keeping them in place. The few parties that do object look to the past in an attempt to rationalize continued application of these rules, even though the marketplace and regulatory landscape has changed so significantly that any need for the rules that once might have existed has been eliminated.

1. Price Cap Regulation Eliminates the Need to Allocate Joint and Common Costs Between Regulated and Nonregulated Services for Broadband

As BellSouth discussed in its Petition, price cap regulation has obviated the need for cost allocation rules because it eliminated a direct link between costs and prices that is inherent in a rate-of-return economic regulatory environment. The abandonment of cost-based rates for price caps clearly calls into question the basis for this decision.

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[144] Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, 20760-61, ¶ 53 (1996) (footnotes omitted).

Although several commenters point to the fact that the Commission continued to require costs allocation in orders adopting, and subsequent to the implementation of, price cap regulation,[145] this contention ignores the fact that significant changes have occurred in price cap regulation -- changes that go to the very heart of why the Commission continued the application of cost allocation rules in its price cap regime.[146] Indeed, shortly after it continued to apply the cost allocation rules in a price cap environment, the Commission, as well as federal courts, correctly recognized their limited need stating that "because price cap regulation severs the direct link between regulated costs and prices, a carrier is not able automatically to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to allocate nonregulated costs to regulated services."[147] The Commission further demonstrated its

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145 *See* AT&T Comments at 20; FDN and PAC-West Comments at 29-31; FISPA at 45; ITA of America at 17-18.

146 AT&T is well aware of the impact of price cap regulation on the occurrence of costs and the setting of prices and certainly believes in the effectiveness of price cap regulation for eliminating the need for cost allocation when it suits its purpose. When seeking to have the Commission's accounting rules revised as applying to AT&T's services subject to price cap regulation, AT&T fully acknowledged that "*with respect to AT&T's services still subject to price caps, the specifics of AT&T's price cap plan eliminate any ability or incentive to shift costs.*" Comments of American Telephone and Telegraph Company, CC Docket No. 93-251, at 11 (filed Dec. 10, 1993) (emphasis added). AT&T went on to conclude "[i]n short, the basic assumption of the cost-shifting/cross-subsidization theory (i.e., that a regulated carrier can recover inflated transfer prices or other shifted costs through higher regulated price levels) is entirely inapplicable to AT&T . . . for services subject to AT&T's price cap regulatory system." Id. at 13.

147 *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, *Report and Order*, 6 FCC Rcd 7571, 7596, ¶ 55 (1991), *California v. FCC,* 39 F.3d 919 (9th Cir. 1994), *cert denied*, 514 U.S. 1050 (1995); *see also, California v. FCC*, 39 F.3d at 926-27; *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Circuit), *cert denied*, 510 U.S. 984 (1993) ("[price cap regulation] reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling.").

belief that cost allocation was becoming less necessary in the *Accounting Safeguards Order.*[148] In that proceeding, the Commission reviewed the necessity of continuing the cost allocation requirements of Part 64 in light of price cap regulation but found that because of the sharing component of price caps, the lower formula adjustment mechanism ("LFAM"), and the fact that some intrastate services remained under rate of return regulations that carriers may still have an incentive to "assign a disproportionate share of costs to regulated accounts." The Commission stated, however, "[w]e recognize that changes in the competitive conditions of local telecommunications markets in the future may cause us to re-examine the continued need for our Part 64 cost allocation rules." [149] Since that time, the marketplace and regulatory paradigms have changed significantly. Competition has increased and the Commission has eliminated, for large ILECs, the sharing and LFAM[150] elements from price cap regulation -- the only remaining elements that could have created potential incentives for price cap ILECs to shift costs. [151]

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148 *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, *Report and Order,* 11 FCC Rcd 17539 (1996) ("*Accounting Safeguards Order*").

149 *Accounting Safeguards Order,* 11 FCC Rcd at 17661, ¶ 271.

150 LFAM was eliminated for any price cap ILEC that chose to take advantage of pricing flexibility for access services. All of the major ILECs have taken advantage of pricing flexibility and thus have lost any right to LFAM.

151 *See Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, CC Docket Nos. 94-1 and 96-262, *Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 FCC Rcd 16642, 16700, ¶148 (1997) ("*1997 Price Cap Review Order*"), *aff'd in part, rev'd in part, United States Telecom Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999). *See also Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; and Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14304, ¶ 162 (1999) ("*Pricing Flexibility Order*").

Finally, most incumbents, including BellSouth, operate under price regulation for intrastate services. That alone should alleviate any past Commission concerns regarding cost allocation but even if this were not true, just because a relatively limited number of LECs may remain under rate of return regulation is no reason to require all carriers to follow the Commission's costs allocation rules. Regardless of how broadband is treated within the Commission's accounting system, in the rate of return states, rates may be based on the cost of a stand-alone voice network.

These changes fully justify the Commission "re-examin[ing] the continued need for [its] Part 64 cost allocation rules" and finding them no longer necessary in the broadband services market.

In spite of these changes, some parties persist in alleging that the cost allocation rules continue to serve a needed purpose. ITA suggests that use of common facilities for both regulated and un-regulated services provides the LECs with operating efficiencies that will not benefit the ratepayer and instead cause these ratepayers to overpay for regulated services unless cost allocation occurs.[152] This flawed argument fails for two reasons. First, the very purpose of price cap regulation was to permit carriers to increase returns by creating efficiencies in their operations or by developing new services that customers want. Ratepayers are protected in this environment by maximum caps on prices that carriers may not exceed. To suggest that ratepayers must receive the benefit of every efficiency that a carrier obtains under price cap regulation without sharing, denies the very essence of the system. No one can seriously suggest that price cap regulation has failed and the Commission should return to rate of return regulation.

152 ITA Comments at 17 – 18.

Second, price caps also protect ratepayers because ILECs subject to price cap regulation cannot raise prices for price cap services if the ILECs become more inefficient. The fact of the matter is that ITA raises the specter of consumer's paying unreasonable prices but price cap regulations was designed specifically to regulate prices and insure that they remain just and reasonable. Cost allocation is a mechanical process unrelated to price setting or price regulation.

MCI argues that cost allocation remains necessary because the exogenous costs component of the price cap formula is dependent on the BOC's actual costs. MCI states "all exogenous cost changes prescribed in section 61.45(d) of the Commission's rules involve changes in the underlying regulated interstate costs of the price cap carrier, and require the carrier to adjust its price cap indices to reflect such cost changes."[153] While certain exogenous cost changes have in the past relied on supporting cost information, almost all remaining exogenous cost changes for BellSouth no longer require the underlying cost support contemplated by MCI and thus offer no basis for requiring continued cost allocations.

By definition, exogenous changes are "triggered by administrative, legislative, or judicial action beyond the control of the carriers."[154] Exogenous changes represent items that would have had an impact on the July 1, 1990 data used to establish the initial price cap rates, but were not reflected in the initial rates. An exogenous change, if material, could either raise or lower the price cap index ("PCI"); however, if a BOC seeks such an adjustment, the Commission could

153 MCI Comments at 13.

154 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, *Order on Reconsideration*, 6 FCC Rcd 2637, 2662, ¶ 58 (1991).

conduct an investigation of a particular exogenous event.[155] Thus, continued regulation of costs to analyze an exogenous cost adjustment that could impact the PCI index is illogical and an immense waste of resources. The Commission would simply place the burden on that BOC to justify its costs. Thus, while it is not known to what extent, if any, costs will be used in the calculation of future exogenous cost adjustments, it is clear that any such event is certain to be evaluated on a case-by-case basis, and the BOC will have to provide sufficient detail to justify the exogenous cost determination.

2. The Commission has No Statutory Obligation to Apply Its Current Cost Allocation Requirements to Broadband Services

Beyond its attack on the alleged shortcoming of price cap regulation, MCI argues that the Commission cannot grant the BellSouth's petition because of Section 254(k) of the 1996 Act. This statute, however, does not require the Commission to apply the cost allocation rules to broadband services.

Section 254(k) prohibits a carrier from using services that are not competitive to subsidize services that are competitive. Additionally, it requires the Commission, through the establishment of any *necessary* cost allocation rules, accounting safeguards, and guidelines, to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.[156] Allocating joint and common costs to broadband, however, will do nothing to ensure that the objectives of

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155 See e.g., Tariffs Implementing Access Charge Reform, CC Docket No. 97-250, *Order Designating Issues for Investigation and Order on Reconsideration*, 13 FCC Rcd 2249, 2269, ¶ 47 (1998).

156 The Commission codified this section in Part 64, "A telecommunications carrier may not use services that are not competitive to subsidize services subject to competition. Services included in the definition of universal service shall bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." 47 C.F.R. § 64.901(c).

Section 254(k) are met. Indeed, MCI fails to demonstrate that an allocation of costs is necessary in this situation to prohibit competitive services being subsidized by noncompetitive services. As discussed extensively above, no matter what amounts remain classified as regulated costs, the price for the services charged to customers is established pursuant to the price cap formulas. And, price caps were implemented to ensure that a carrier could not increase prices for services subject to price caps to offset prices for services that are not subject to price caps.[157]

As for universal service, the statute plainly gives the Commission discretion to determine what regulations may be *necessary* to achieve the purpose Section 254(k) sought to accomplish. The application of existing cost allocation rules is unnecessary to ensure that services within the definition of universal service do not incur an unreasonable share of the costs of the facilities used to provide those services. First, contributions to the Federal universal service fund are based on interstate retail revenues. Because a carrier's revenue is based on the prices it charges customers, cost allocation will not affect the contributions to the universal service fund. Second, distributions from the USF are based on a hypothetical cost model and are not based on the Commission's Part 32 or Part 64 cost structure. Because contribution and distributions are not affected by cost allocation, application of the cost allocation rules would have no connection to objectives the Commission desires to achieve.

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157 The price cap limits are set by the Commission to ensure that rates remain within a zone of reasonableness and are established pursuant to the price cap index, which is adjusted based on the gross domestic product, and a pre-established productivity factor. Prices are held to a maximum level by the cap. Customers are also protected from cross-subsidization by the grouping of services in price cap baskets, which prevents a carrier from raising rates in one basket and lowering them in another to the detriment of the customers using the services in the first basket.

For these reasons, as well as the price cap regulation issues discussed above, it is not necessary to apply cost allocation rules to the joint and common costs in the provision of broadband services.

II. BELLSOUTH HAS APPROPRIATELY SOUGHT FORBEARANCE FROM UNNECESSARY AND ANTICOMPETITIVE REGULATION IN THE BROADBAND MARKET

Some opponents assert that there are other reasons why the Commission can and should decline to grant BellSouth's requested relief, even if the Commission were to conclude that the prerequisites for forbearance were otherwise met and, consequently, granting the relief was in the public's best interest. These arguments uniformly lack merit.

A. This Commission Cannot Deny This Petition Because of the Pendency of Other Proceedings Before the Commission and the Courts

A number of commenters claim that the pendency of other rulemaking proceedings or the *Brand X* litigation provides a basis for denying BellSouth relief in this context. For instance, CompTel/ASCENT argues that, because the *Wireline Broadband* rulemaking is still pending, BellSouth's Petition is "premature" and an improper "end run" on established procedure.[158] CompTel/ASCENT similarly claims that the Commission should await the Supreme Court's decision on review of the Ninth Circuit's *Brand X* decision, because, a Supreme Court affirmance of the Ninth Circuit's decision will supposedly "gut" BellSouth's arguments regarding the disparate treatment of cable and wireline broadband.[159]

Neither argument is correct. The pendency of other proceedings is legally irrelevant to the Commission's statutory duty to grant forbearance when the statutory criteria are met.

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[158] CompTel/ASCENT at 1-2.

[159] *Id.* at 2-3.

Congress stated that the Commission "*shall* forbear" if those criteria are met.[160] As the Supreme Court has emphasized, "shall" is the "language of command,"[161] and there is no exception to the Commission's duty to grant forbearance that would apply in instances in which an issue may be presented in a pending rulemaking proceeding. Indeed, Congress plainly required the Commission to decide forbearance petitions within one year[162] to ensure that the Commission acts promptly on requests for deregulatory relief. It would turn that legislative intent on its head to reject a request for forbearance on the basis that the same issue is pending in another proceeding in which the Commission has no similar deadline for action – and in this instance has failed to act for several years.

Brand X similarly poses no obstacle to granting relief to BellSouth. As BellSouth has explained, the Ninth Circuit did not address either the Commission's conclusion that it would waive the *Computer Inquiry* rules to the extent they apply to cable modem services or the Commission's tentative conclusion that it would forbear from applying Title II common-carrier obligations to those services.[163] Accordingly, even if the Supreme Court affirms the Ninth Circuit, that result will not affect the issues presented here. For that reason, even EarthLink, which opposes BellSouth's Petition, has properly conceded that "*Brand X* and forbearance are separate issues."[164] In any event, the Supreme Court has set argument in *Brand X* for March 2005, and under established procedures should resolve the case before the end of June.

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[160] 47 U.S.C. § 160(a) (emphasis added).

[161] *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935).

[162] *See* 47 U.S.C. § 160(c).

[163] *See* Pet. at 5-6.

[164] EarthLink at 27.

B. BellSouth Has Appropriately Defined the Relief It Has Sought

There should also be no legitimate concern regarding the scope of the relief that BellSouth is requesting, as some commenters erroneously claim.

AT&T asserts that BellSouth's definition of broadband is somehow "extraordinarily broad" and allegedly includes a "virtually unlimited array of the networks and technologies that have historically been used to provide basic transmission services."[165] In fact, however, BellSouth has limited its request to "broadband" transmission services capable of providing 200 kbps in both directions, which is both a clear rule and one that tracks this Commission's own prior statements as to what functionalities qualify as "broadband" or "advanced services." The Commission stated just last year that it "use[s] the terms 'advanced telecommunications capability' and 'advanced services' to mean services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of 200 kbps or greater. *Such facilities and services are referred to as 'broadband' throughout this report, and, as the report details, they include both wireline (telephone company and cable) as well as a growing list of wireless facilities, both licensed and unlicensed.*"[166]

Nor, contrary to commenters' arguments, is there anything vague about seeking relief from the common-carrier obligations of Title II, including sections 201 through 203.[167] As emphasized above, cable modem providers – indeed, all other competing broadband providers – are currently free from those requirements, and the Commission has tentatively concluded that it would forbear from Title II regulation even as to these market leaders if necessary. All BellSouth seeks is equivalent treatment – nothing more and nothing less.

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[165] AT&T at 3-4.

[166] *Fourth Advanced Services Report*, 2004 FCC LEXIS 5157, at *6 (emphasis added).

[167] *See*, *e.g.*, AT&T at 4, 13-18; EarthLink at 2.

BellSouth's request also does not implicate the "fully implemented" requirement of 47 U.S.C. § 160(d).[168] As BellSouth expressly noted at footnote 103 of its Petition, issues regarding forbearance from sections 251 and 271 are presented in other proceedings, and are not being raised here.

There is likewise no conflict between BellSouth's request and the Regulatory Flexibility Act.[169] Indeed, although FISPA raises this provision, it does not cite any statutory provision that BellSouth's request (or the Commission's treatment of that request to date) violates. On the contrary, the significant number of comments filed by ISPs indicates that small businesses are fully aware of this proceeding and able to participate in it.

C. Granting This Request Would Not Imperil Universal Service or Other Social Policies

Some commenters also contend that, by granting BellSouth forbearance from Title II common-carrier regulation, the Commission would be inadvertently putting in danger compliance with emergency service, law enforcement access, and other social policies.[170]

That is not the case. As BellSouth has explained in full in prior filings,[171] the determination that a service should be regulated exclusively under Title I in no way prevents the Commission from crafting reasonable rules to protect the public interest. Indeed, it has long been the function of Title I to allow the Commission to address revolutionary developments such as the rise of broadband services: "*Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of*

[168] *See* MCI at 11; FISPA at 52-53.

[169] *See* FISPA at 53-55.

[170] *See, e.g.*, AT&T at 7-8.

[171] *See* Comments of BellSouth Corporation, WC Docket Nos. 04-29 & 04-36, at 48-54 (FCC filed May 28, 2004); Reply Comments of BellSouth Corporation, WC Docket Nos. 04-29 & 04-36, at 30-32 (FCC filed July 14, 2004).

communications.'"[172] The Supreme Court thus explained decades ago that Title I is a core element of the "comprehensive mandate" that Congress has given to this Commission to ensure rational treatment of "a field that was demonstrably 'both new and dynamic.'"[173] As the Commission has explained, "[f]ederal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit statutory authority, if the regulations are reasonably ancillary to existing Commission statutory authority."[174] Accordingly, to the extent there is any concern about the need to preserve important social policies, those concerns can be addressed through the Commission's use of its "elastic" powers under Title I. Indeed, Title I treatment is particularly appropriate here as it allows the Commission to ensure that all competing providers are subject to the same obligations.

That principle applies with particular force in the context of universal service. As the Commission has explained, universal service contribution policies should "reduce[] the possibility that carriers with universal service obligations will compete directly with carriers without such obligations."[175] Consistent with that insight, all providers of broadband services should have the same universal service obligations. Any other result would disadvantage one set of providers because of the broadband platform they use, which would be inconsistent with the Commission's own prior determinations that universal service mechanisms should be

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[172] *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (citation omitted).

[173] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

[174] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4841, ¶ 75.

[175] Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9183-84, ¶ 795 (1997) ("*First Universal Service Order*").

technologically neutral, in order to allow the "marketplace to direct the advancement of technology and all citizens to benefit from such development."[176]

The Commission has explicit statutory authority to avoid such unfortunate results, and that authority does not depend on services being classified as telecommunications services subject to Title II. In particular, section 254(d) authorizes the Commission to require all providers of interstate "telecommunications" to "contribute to the preservation and advancement of universal service" if the "public interest so requires." By exercising that authority, the Commission can ensure that the same universal-service obligations apply to all broadband providers, regardless of technology.

CONCLUSION

To the extent they would otherwise apply, the Commission should forbear from applying to ILEC broadband service (1) *Computer Inquiry* requirements, (2) Title II common-carrier requirements and (3) Part 64 accounting requirements.

Respectfully submitted,

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[176] *Id.* at 8802, ¶ 49.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements.	)	

REPLY AFFIDAVIT OF ERIC FOGLE

I, Eric Fogle, being of lawful age and duly sworn upon my oath, depose and state:

I. PROFESSIONAL EXPERIENCE

1. My name is Eric Fogle. I am employed by BellSouth Resources, Inc., as a Director in BellSouth Telecommunications, Inc. ("BellSouth") Interconnection Operations. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I attended the University of Missouri in Columbia, where I earned a Master of Science in Electrical Engineering Degree in 1993 and Emory University in Atlanta, where I earned a Master of Business Administration degree in 1996. After graduation from the University of Missouri in Columbia, I began employment with AT&T as a Network Engineer, and joined BellSouth in early 1998 as a Business Development Analyst in the Product Commercialization Unit. From July 2000 through May 2003, I led the Wholesale Broadband Marketing group within BellSouth. I assumed my current position in Interconnection Operations in June of 2003. First, as a Business Analyst, and then as the

Director of the Wholesale Broadband Marketing Group and continuing in my current position, I have been, and continue to be, actively involved in the evolution and growth of BellSouth's broadband network and product development, including the initial rollout of BellSouth's Regional Broadband Aggregation Network ("RBAN"), and its subsequent improvements.

2. My Reply Affidavit responds to comments of AT&T, Sonic.net, Vonage, IgLou Internet Services ("IgLou"), Computers-N-Service ("Computers"), RAD-Info, Inc., as well as other parties that support the continued application of Computer Inquiry ("CI") rules and Title II obligations to broadband services. This Affidavit will reply to comments regarding the costs of CI compliance, as well as comments concerning intermodal broadband competition, and the impact of removing CI rules on future product and service innovation.

Cost of Complying with Computer Inquiry Obligations are Significant

3. AT&T and other parties attempt to minimize BellSouth's cost of complying with existing CI rules and Title II common-carrier regulation. Such attempts are simply wrong.

4. AT&T and others first claim that many of the costs are not required since there is no separate affiliate obligation contained in the CI rules. Although a separate affiliate is not expressly required by the CI rules, it is simply not practical to guarantee non-discriminatory access to systems and people without creating separate functional organizations for certain tasks. For instance, the CI requirement for a common interface for wholesale Internet Service Providers

("ISPs") and BellSouth's retail ISP operation requires that the two (2) groups be functionally separated. Specifically, BellSouth maintains a large customer facing support organization to support its own FastAccess® Digital Subscriber Line ("DSL") customers, and a separate large Broadband Service Support Group that supports all ISPs (including FastAccess®) customer issues. During the process of troubleshooting an individual outage with a customer, BellSouth's non-discriminatory process requires that the FastAccess® service representative only troubleshoot the enhanced service portion of the network serving the individual customer. If the customer service representative believes that the trouble is located in the regulated portion of the DSL network, then BellSouth's current non-discriminatory obligation requires that the service representative (and often the customer) wait in a second cue with the broadband service support group. This is to ensure that all of the ISP customer troubles are handled in a non-discriminatory manner. Once the second technician is on the line, BellSouth now has two employees engaged in troubleshooting the single customer trouble. Almost all attempts that BellSouth has made to streamline this process between its retail and wholesale support organizations have been thwarted by the existing CI rules. Specifically, BellSouth cannot provide access to its own systems to its own employees (hired by BellSouth, and located in a secure environment using computers provided and supported by BellSouth) without making the same systems available to ISP customer service employees. These ISP employees have not been hired by BellSouth, are not necessarily located in a secure location, and are using computer systems that may not be adequately protected from intrusion. The practical impact of the CI rules is that all ISPs are given the same access to BellSouth's DSL support systems, which means that in order for BellSouth to offer an automated system interface to its own ISP (that serves more than 80% of its DSL end users), if must create a secure interface for all ISPs to use. These large volume automated systems are used primarily by BellSouth's own ISP, and occasionally one or two of BellSouth's largest wholesale ISPs, but the interfaces must be built in such a manner to support more than 200 different ISPs on a non-discriminatory basis. Alternatively, a great majority of the smaller ISPs choose to use web based interfaces that do not have the same level of complexity and security issues. If the CI rules were removed, then BellSouth would be able to customize the web interfaces to meet the needs of the smaller ISPs, and the automated (machine to machine) interfaces to meet the needs of its larger ISPs (including its own retail operation). Besides the systems integration issue, and the dual support technicians, there are a number of other communications and coordination areas that are complicated by the CI rules. These complications create additional costs due to redundant work, or personnel, and require that BellSouth invest significant time and resources to remove these unnecessary costs. As I highlighted in my prior affidavit, BellSouth has been developing a ticketing interface to be used between the ISPs (including BellSouth's own retail ISP), and BellSouth's network organization. This additional ticketing functionality is completely redundant with other retail and wholesale trouble ticketing systems within BellSouth, but due to the complexities of the CI requirements considerable additional expense was required during development.

5. AT&T further suggests that software changes can allow for the basic transmission facilities, and the enhanced or information service offering on the same transmission facility. Indeed, AT&T speaks of current packet technology, which has the ability to intermingle basic and enhanced services on the same facility. This is the exact functionality that every broadband service competitor can avail themselves of, except for BellSouth and the other Regional Bell Operating Companies ("RBOCs"). Specifically, if BellSouth wanted to leverage the capabilities of a modern packet network, and provide a new and innovative enhanced service offering ((such as Voice Over Internet Protocol ("VoIP"), or Internet Protocol Television ("IPTV")), then any equipment that is used to provide the underlying transport of either of these new enhanced services would have to be made available on a non-discriminatory basis to independent ISPs, at significant costs and delay to development.

6. The issue AT&T brings to light above regarding the availability of equipment and software that combines both enhanced and basic capabilities is actually further complicating BellSouth's ability to comply with the existing requirements. Equipment and software providers are continually developing new capabilities and features, as well as integrating functionality that was once available only across multiple hardware platforms. As a result, the functionalities that were once distributed across the network, in easily separated areas, are now fully incorporated into single servers with high powered processors that can fully integrate multiple service layers. The effect of this convergence is that the costs

of continued compliance with CI and Title II obligations are increasing, even as BellSouth attempts to evolve its network with the latest, most efficient technologies and components.

7. AT&T suggests that delays associated with offering wholesale DSL transport products as a result of the CI rules do not put BellSouth at a disadvantage to the dominant broadband provider -- cable modem service. That is incorrect. The impact on BellSouth is two fold. First, contrary to AT&T's suggestions, there is competition in wholesale cable broadband access, as demonstrated by recent announcements of MCI and New Edge Networks utilizing the footprint of several cable companies to increase their broadband services reach. Second, in complying with the CI rules, BellSouth's retail Internet service organization can not avail itself of any new underlying transport technology (such as End User Aggregation that is the underlying transport for RBAN), unless the service is generally available via a tariff to all ISPs. The delay associated with offering the tariffed service creates a subsequent delay in offering the retail products. One such example is the offering of 3 Megabits per second ("Mbps") downstream by 384 kilobits per second ("kbps") upstream DSL service. In compliance with current CI rules, this offering was developed and tariffed before BellSouth could make a similar retail FastAccess® offering. This two-step process is cumbersome, and creates significant delays in competitive product offerings developed to compete against existing cable modem offerings.

8. Sonic.net and others claim that any costs associated with complying with the CI rules are well within BellSouth's ability to handle. Contrary to their claims, these

costs simply increase the price ultimately paid by end users and impedes BellSouth's ability to compete against cable by offering new innovative service arrangements to the detriment of the overall market. Indeed, while there are numerous broadband customers of independent ISPs using BellSouth's network pursuant to negotiated commercial agreements for more efficient, enhanced transmission offerings, there are relatively few broadband end users that continue to rely upon the basic transmission that BellSouth must offer pursuant to CI. Nevertheless, BellSouth continues to incur *all* of the costs of CI and Title II compliance that it must then attempt to recover from its entire customer base. If the cost of the CI regulatory burden were placed entirely on the customers of independent ISPs that continue to rely upon the basic tariffed transmission offering (instead of spread across all of BellSouth's DSL subscribers), then the cost per independent ISP customer would exceed $23 per month. Further, if you remove the tariffed customers of AOL, which has already publicly stated that it will no longer use the tariffed transport service as a component of its enhanced service offering, the cost leaps to more than $31 per customer per month. In essence, the regulatory costs associated with complying with the CI rules not only inhibit BellSouth's cost competitiveness via cable modem, but it also unfairly taxes the overwhelming majority of the DSL end-users on BellSouth's network who chose to purchase Internet service from BellSouth, or from ISPs that do not buy services directly from BellSouth's tariffs. Under no such circumstances can the Commission properly conclude that any claimed benefits derived by this relatively small portion of the overall customer base somehow justify or outweigh the costs of continued compliance with CI and Title II.

9. At the same time, the percent of customers relying on the tariffed offering continues to decrease; yet, as I previously pointed out, the costs I have identified are fixed and are incurred by BellSouth regardless of whether any independent ISP actually purchases the tariffed product. BellSouth has already been moving toward market-based arrangements with unaffiliated ISPs, and has signed nine (9) RBAN agreements that comprise over 45 percent of BellSouth's wholesale ISP end users. For that reason, only 55 percent of the independent ISP end users that use BellSouth broadband transmission continue to rely upon BellSouth's tariffed service. When all broadband subscribers within BellSouth's region are taken into account, *the percentage of end users actually receiving service over the tariffed basic transmission that BellSouth must offer pursuant to the Computer Inquiry regime is less than two (2) percent.* Nevertheless, BellSouth continues to incur tens of millions of dollars of yearly expense to comply with the Computer Inquiry mandates.

10. Contrary to the comments by Vonage, BellSouth's CI costs are not overstated. Indeed, BellSouth has provided the Commission with very conservative estimates of its costs. The organization size and costs associated with serving wholesale customers in the manner required by CI is actually much greater than those direct costs that BellSouth has included in its affidavit and briefs. Moreover, the only costs that have been included in arriving at the $3.50 per month per customer figure are those costs that are *directly* associated with the added work functions of groups that are necessary only to comply with the

outdated CI regime. Moreover, BellSouth has not included many costs that are not as easily quantified, but are still significant. Such costs include; cost of redundant hardware and its associated operating software necessary to create a wholesale interface that is available on a non-discriminatory basis to all ISPs, lost revenue due to delay of retail and wholesale broadband products caused by the additional complexity associated with complying with the CI regime, and the cost of the significant number of management, and legal personnel that must review every change in product, process, and equipment used to serve BellSouth's retail broadband operation to ensure that all such changes are made available in a non-discriminatory manner to all ISPs. It is estimated that these costs add up to tens of millions of dollars, but are not as easily quantified, and were therefore not included in BellSouth's analysis of direct costs associated with complying with the current CI rules.

11. IgLou states that mandated open access requirements are one-time design decisions. IgLou is wrong. BellSouth incurs continuing costs as a result of these unnecessary rules, and thus is continually unable to deploy broadband facilities and capabilities as quickly or efficiently as it otherwise would. Indeed, all of the costs associated with supporting the CI rules provided in my affidavit are from 2003 and 2004. BellSouth started offering DSL to ISPs in 1998, and is still incurring more than $20M in annual costs more than five (5) years later. IgLou goes on to state that variable costs are already being provided for in BellSouth's current rates for wholesale DSL. IgLou simply ignores the fact that BellSouth's broadband services are offered in a competitive market, and that BellSouth does

not have pricing power. As a result, even though the cost of complying with the CI rules has increased in many areas over the last five (5) years, BellSouth has charged less and less for its wholesale DSL service in order to stay competitive. For instance, BellSouth launched its tariffed 1.5Mbps by 256kbps DSL service with more than a $100 activation charge, and at a monthly recurring rate that was $38 for most small ISPs. Today, BellSouth is often offering promotions that waive non-recurring fees, and the 1.5Mbps by 256kbps wholesale product is available to ISPs at $26 per month, regardless of their size.

12. Computers-N-Service Internet ("Computers"), commented that BellSouth has rendered obsolete the virtual circuit ("VC") based deployment that a majority of ISPs have been using to offer their DSL service. Contrary to these claims, BellSouth will continue to offer and support the VC based DSL architecture. In fact, BellSouth's own retail ISP continues to purchase and utilize the VC based architecture in much the same manner as the independent ISPs. Specifically, the VC based architecture is better suited to serving business customers and their applications. Computers fails to mention the fact that the retail rate for business DSL services is often $10 to $30 per month higher than the same speed broadband service for residential customers. This is due to the increased demand, usage, and support requirements that businesses place on the services that they buy. Due to the different nature of business and residential customer usage patterns, it is very reasonable that BellSouth (as well as other DSL providers) would offer a more cost effective platform for its ISPs higher volume residential customers and their applications. The cost effectiveness of the newer

platform (called End User Aggregation or "EUA") has been passed to the ISPs in the form of lower prices.

13. Computers goes on to state that EUA is slower (contains more latency), and troubleshooting by the ISP is much more complicated and sometimes impossible. This comment flies in the face of reality. BellSouth simply cannot move more than 1.9 million of its own retail FastAccess® DSL customers to a network that is "more complicated" and where troubleshooting is "sometimes impossible." Such a maneuver would be highly unprofitable, since end user customers have many choices for broadband service (most notably, more than 60% choose cable). Moreover, other large ISPs that utilize BellSouth's network have migrated tens of thousands of end-user customers from a VC based architecture to an EUA based service. With regards to latency, if the ISP or end user has an application that requires less latency then the EUA product provides, then the VC based product is still available (at the same speed and price it was available prior to the EUA product rollout) for the ISP to continue to use to serve their end user customer.

14. Computers further states that it did not initially use EUA since it was only offered at DS3 backhaul connection speeds. BellSouth agrees that it only initially offered EUA at DS3/OC3/OC12 speed connections due to a limitation from its equipment vendors. In order to cost effectively utilize a DS3 connection, an ISP must have at least several hundred end user customers regionwide. Even though all of BellSouth's largest ISPs, including its own retail broadband organization exceed this minimum customer threshold, BellSouth continued to

pressure its equipment vendors, and developed a DS1 interface for EUA that is specifically for smaller ISPs. To further bridge the gap, BellSouth offered the DS3 EUA interface at roughly DS1 prices for a number of months prior to the rollout of the DS1 interface (described in more detail below).

15. BellSouth has also developed and offered new products and additional promotions on its DSL products specifically geared towards smaller ISPs. BellSouth's shared ATM connection to the broadband gateway ("BBG") allows multiple architectures on the same connection at considerable savings for smaller ISPs. Even though its own retail broadband operation uses DS3 and higher capacity connections, BellSouth developed a DS1 connection to the BBG specifically for the smaller ISPs that do not have sufficient volume to warrant a DS3 connection. In addition, BellSouth offered three different pricing promotions in 2004 that allowed great savings for ISPs using the BellSouth broadband network. The promotions are as follows:

- DS3 promotion: allows a 75 percent discount on the DS3 BBG connection and DS3 Lightgate transport (when purchased together) and allows a network service provider ("NSP") to connect to BellSouth on the BBG technology at near DS1 rates during the promotional period, this promotion was offered until the DS1 connection product could be launched to help lessen the start-up cost especially for the smaller NSPs. Nine (9) ISPs signed up for this promotion.

- 256K promotion: offered from September 1, 2004 until January 31, 2005, this promotion provides two (2) months of credit for each new 256K DSL order completed.

- NRC promotion: launched March 3, 2004 until December 31, 2004, this promotion provides NRC credit for all new Virtual Circuits, the amount of which is determined on a sliding basis and is dependent on how many subs are ordered each month. This promotion was capped at 100 orders (gearing towards the smaller NSPs).

As stated above, BellSouth does not utilize the DS3 or NRC promotions for its retail broadband Internet access product.

16. Computers also commented that they cannot seamlessly deploy virtual private networks ("VPN") and VoIP services across EUA. This is difficult, if not impossible, to believe since thousands of end user customers are using both VPN and VoIP across BellSouth's EUA platform every day.

17. Computers goes on to demonstrate their fundamental lack of understanding of the complexities associated with developing and managing a large broadband network under the CI regime when they complain that BellSouth does not let the ISP pick the speed of transport, but only their selected speeds and symmetry. BellSouth currently serves more than 240 independent ISPs, many of which have unique customer requirements. Due to the outdated CI regime, BellSouth must offer all transport services, features, terms and conditions equally to all ISPs via a tariff. Although modern equipment allows for the traffic shaping that Computers requires, the overhead associated with offering every such speed at the same terms and conditions to all ISPs via a tariff is prohibitively expensive for such small volume applications. Indeed, BellSouth would be better able to offer Computers the speed profiling that it desires if the Commission granted BellSouth's requested relief and ended CI's applicability to broadband.

18. Rad-Info comments that smaller ISPs are disadvantaged by Private Carriage Arrangements ("PCAs"), since better terms and conditions could be made available to larger ISPs, and that tariffed offerings level the playing field. This is not true. Larger ISPs do create economies of scale, and have negotiating power

across the industry. Thus, large independent ISPs such as Earthlink have negotiated private carriage agreements. The tariffed offering required under CI, however, does not level the playing field between large and small ISPs. Indeed, smaller ISPs would be more likely to receive the tailored transmission services that they require if the CI tariffing requirements were eliminated.

19. Rad-Info's comments suggest that the two (2) year delay associated with developing an enhanced product (RBAN) in compliance with the CI rules was probably due to deployment of equipment. What Rad-Info suggests is simply not true. BellSouth's offering of RBAN was not predicated on the universal availability of equipment. In fact, RBAN availability was phased by equipment deployment plans that started in larger markets, and then moved to smaller markets. Even though equipment was available in BellSouth's largest markets (Atlanta and Miami) for almost two (2) years, BellSouth was still unable to offer RBAN to its ISP customers until it had fully developed and tariffed the underlying transport service, and then the enhanced service offering.

20. Rad-Info goes on to complain that the transition from VC to EUA is a large undertaking, which requires Customer Provided Equipment ("CPE") reconfiguration, changes to network equipment, as well as paying BellSouth charges (transfer, early termination, and the like). This is at best misguided, and any confusion can easily be remedied by discussing the transition steps with any of a number of ISP support personnel at BellSouth. BellSouth FastAccess®, and other large ISPs have successfully transitioned hundreds of thousands of customers (which is a significantly higher volume than all of the smaller ISPs

combined) that all had embedded CPE (which required minor reconfiguration) and changed their network equipment. Second, there is no transfer fee associated with moving from BellSouth's tariffed product to RBAN, and the only fee that could possibly be owed would be the tariffed early termination fee that is assessed if a particular end-user customer is not on BellSouth's network for at least six (6) months. These fees are easily avoided in one (1) of two (2) ways. First, the ISP can wait and transfer new customers after they have exceeded the six (6) month window. And second, the ISP can utilize one of the multiple fee holidays that BellSouth has provided strictly for the purpose of allowing ISPs to rearrange their networks without paying for rearrangement fees.

Demonstration of Significant Intermodal Broadband Competition

21. IgLou attempts to paint the picture that closed access to DSL transport would remove competition for business customers, leaving competitors with a single choice for access. This is false simply because BellSouth has no intention of removing access to DSL transport services.

22. The existence of these intermodal alternatives is supported by BellSouth's own research on cable modem availability to residential and small business customers. In the second half of 2003, BellSouth sampled end user telephone numbers and addresses (including business numbers and addresses) on major cable modem provider websites. This sampling consisted of inserting these telephone numbers or addresses into the cable companies' websites to determine whether the telephone number or address showed as qualifying for

cable modem service. Once the telephone number or address was accepted as valid by the cable company, BellSouth identified the query as "accepted" or as an "accepted query." 157,888 telephone numbers or addresses were accepted queries. Of these 157,888 telephone numbers or addresses, 85% were identified as qualified for cable modem service throughout BellSouth's region. Additionally, in BellSouth's most competitive central offices, 87% of these 157,888 telephone numbers or addresses were identified as qualified for cable modem service. 30,639 business telephone numbers or business addresses qualified for cable modem service out of a total 51,012 business numbers or business addresses regionwide. Stated differently, 60% of the business lines tested by BellSouth qualified for cable modem service. This is a conservative view of competitive cable modem availability since an entire year has passed since this study was completed and cable modem providers have added to their deployment and service capabilities during the interim. BellSouth attempted to update this information in order to provide the Commission with more current data, however, cable companies' websites now contain an acceptable use policy (which policies were not included when BellSouth's original research was done) that prevents such an update.

23. The important consideration is whether consumers have a choice for broadband. There is significant competition in the broadband market for both residential and business consumers. Consumers can choose between cable modem service, DSL, wireless, and in some cases, power line broadband from power companies.

24. The commentors often dismiss satellite broadband service as an intermodal competitor to DSL technology. However, both major satellite broadband providers (DirecWay and Starband) offer two-way satellite based broadband service.

Next Generation IP Applications and Other Issues

25. Sonic.net attempts to paint the picture that "monopolizing DSL" leads to the monopolizing of VoIP over DSL. This is an extremely narrow view of competition. This is similar to saying that General Motors has a monopoly on the use of Chevrolet engines, and therefore have a monopoly on the Chevrolet parts that are used in those engines. VoIP service providers (of which there are over 400 in the United States today) have built their services to work equally well over any number of broadband transport technologies. With cable modems having a 2 to 1 lead over DSL, and all of the other technology alternatives available, no single technology (with the possible exception of cable modem) has the ability to monopolize broadband service opportunities to the point of inhibiting any particular IP based application.

26. Moreover, as I stated above, VoIP allows a customer to receive local and long distance voice service over any broadband connection. There are currently three (3) "flavors" of VoIP services being offered to consumers. The first "flavor" is the oldest version of VoIP service, and requires both end users to have microphones and speakers on their computers. One of the most popular types of computer-to-computer VoIP is offered by Skype (www.skype.com). The

second "flavor" is best described as computer-to-PSTN (public switched telephony network), and allows computer-based VoIP providers to connect to end users on the traditional PSTN network provided by telecommunications carriers. Although PSTN customers can receive calls from VoIP customers, PSTN customers cannot call these types of computer-based VoIP customers directly. A popular version of this second "flavor" of VoIP service offering is SkypeOut™. The third (and fastest growing) "flavor" of VoIP allows both end users to utilize existing analog telephone handsets, and to both make calls to, and receive calls from, end user customers on the PSTN. This is the 'flavor" of VoIP that receives the most exposure in the press, and is being widely deployed and utilized to compete with circuit switched voice services by AT&T's CallVantage™, Vonage, and cable companies VoIP service offerings.

27. In general, VoIP works by converting the analog voice signal from an ordinary telephone into a digital signal (a stream of data packets) that travels over either the public Internet, or a service provider's private IP network. If the VoIP subscriber is calling a phone number on the PSTN, the digital signal is converted from IP to traditional analog signals before completing the call at the terminating end.

28. In many cases today, VoIP service provided by a non-broadband facility-based provider requires the end user VoIP customer to connect a terminal adapter, which looks like a small modem, to the existing cable modem, DSL modem, or other device that acts as a gateway to the Internet (e.g., a router connected to a fractional T1). The terminal adapter has a standard telephone jack (RJ11) on it,

and the user plugs in a standard telephone to receive dial tone from the terminal adapter. After registering the service with the customer's choice of VoIP provider, such as Vonage, AT&T CallVantage or their cable company, the service is up and running – often within minutes. Today, the service specific terminal adapter is provided to the end user by the VoIP service provider and is designed to work on any number of available broadband platforms.

29. VoIP service offered by cable companies operates similarly, although cable companies will generally provide a single box that integrates the cable modem and terminal adapter functions. Further, since cable providers generally do not provide VoIP service over DSL-based broadband services, they will generally connect their terminal adapter to the home phone wiring (after disconnecting the inside wire from the telephone company's NID) and enable customers to plug a standard phone into any jack in the house, just as they did with phone service provided by the phone company.

30. To further demonstrate that BellSouth does not have any power in the VoIP market, AT&T recently closed a deal with BestBuy in which BestBuy has agreed to market and place terminal adapters on its store shelves. The terminal adapter, as mentioned above, is the hardware device that the consumer plugs into the broadband modem (cable, DSL or other). AT&T and others have now positioned the terminal adaptor device and technology to the retail distribution stage for mass market consumption. BestBuy obviously believes there is enough consumer demand for terminal adaptors to carry the equipment on its limited capacity retail shelves. The customer in BestBuy or any other number of

retail outlets can now pick up a terminal adapter of their choosing (to use on the broadband network of their choice) no differently than they would a video game, a personal computer, or a long distance calling card.

31. AT&T CallVantage is one example of a VoIP service that is available to customers nationwide. AT&T, as well as over 400 other VoIP providers offers service that is available anywhere and everywhere that a customer can get broadband connectivity to the Internet. Thus the VoIP footprint is ubiquitous, and exceeds any individual local exchange companies' or cable companies' boundaries.

32. This concludes my Affidavit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Eric Fogle
Director

Subscribed and sworn to before me

This 28 day of January, 2005

Notary Public

LORI M. CONDRON
Notary Public - Notary Seal
State of Missouri
County of Boone
My Commission Expires October 22, 2006

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